BEFORE THE
GOVERNING BOARD OF THE
NEWPORT-MESA UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against: Certificated Employees of the Newport-Mesa Unified School District, Respondents.	OAH Case No. 2010030738

PROPOSED DECISION

Amy C. Lahr, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 26, 2010, and May 6, 2010, in Costa Mesa, California.

Anthony P. De Marco and Cathie L. Fields, of Atkinson, Andelson, Loya, Ruud & Romo, P.C., represented Bill Cline (Cline), Director of Certificated Personnel, and Elizabeth Novack (Novack), Assistant Superintendent of Human Resources, of the Newport-Mesa Unified School District (District).

Jeffrey R. Boxer, Attorney at Law, represented the Respondents listed in Exhibit ZZ, which is incorporated by reference as if fully set forth herein.

Randall S. Henderson, Attorney at Law, represented Respondent Gloria Henderson.

The District received requests for hearing from 173 certificated employees, as enumerated in Exhibit 4C, which is incorporated by reference as if fully set forth herein, and it indicates the 173 Respondents at issue (Respondents).

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2010-2011 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2010-2011 school year.

The parties submitted written post-hearing briefs. The District's brief was marked for identification as Exhibit 20; the brief for Respondents represented by Jeffrey Boxer was marked for identification as Exhibit LLL; and the brief for Respondent Gloria Henderson was marked for identification as Exhibit MMM. To the extent that Mr. Boxer's brief included new information about Respondents who did not testify at the hearing, it will not be considered.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision on May 6, 2010.

FACTUAL FINDINGS

1. Assistant Superintendent Novack filed the Accusation in her official capacity.

2. Respondents are certificated employees of the District.

3. On February 23, 2010, the Governing Board of the District (Board) adopted Resolution number 27-02-10, reducing or discontinuing the following services for the 2010-2011 school year:

	Service	Full-Teacher-Equivalent Positions	
1.	Administrative Services		5.80
2.	Adult Education		10.90
3.	Elementary Classroom Instruction (K-6)		72.00
4.	High School Counseling		10.97
5.	Secondary Education		8.00
6.	Close Middle College		4.00
7.	Teacher on Special Assignment (TOSA)		
	Beginning Teacher Support and Assessment	0.40	
8.	TOSA – Educational Technology		1.00
9.	TOSA – English Language		2.50
10.	TOSA – GATE/Program Improvement		4.00
11.	TOSA – Reading Coach		1.00
12.	TOSA – Tobacco Prevention	1.00	
13.	Pre-School		3.00
Total			124.57

4. Superintendent Jeffrey C. Hubbard, Ed.D., thereafter notified the Board that he recommended that notice be provided to Respondents that their services will not be required for the 2010-2011 school year due to the reduction or discontinuance of particular kinds of services.

5. By March 15, 2010, the District provided notice to Respondents that their services will not be required for the 2010-2011 school year due to the reduction or discontinuance of particular kinds of services.

6. Respondents timely requested a hearing to determine if there is cause for not reemploying them for the 2010-2011 school year.

7. On or about March 23, 2010, the District issued the Accusations, and served them on Respondents.

8. Respondents thereafter filed timely notices of defense.

9. All prehearing jurisdictional requirements have been met.

10. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.[1]

11. The Board took action to reduce or discontinue the services set forth in factual finding number 3 primarily because it is faced with a 13.5 million dollar shortfall in its budget. The decision to reduce the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

12. The reduction of services set forth in factual finding number 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 Board.

13. The Board properly considered all known attrition in determining the actual number of necessary layoff notices to be delivered to its employees.

14. The District established that it did not violate the Education Code by its classification of employees with temporary status. The District may classify as temporary employees those persons who occupy positions that the Education Code defines or describes as temporary. The District demonstrated that it evaluated every employee classified as temporary, prior to the hearing, and it corrected those who were not lawfully classified as such. Further, the District established that it had more leave of absences available than employees with temporary status; that is, it could have even more employees classified as temporary than it currently did.

15. Respondents Christine Lund, Elizabeth Snelgrave, Deborah Benson, Melinda Savage, Mindy Lynn Tayet, Joanne Nicholson, Abigail Haselton, Kimberly Pyle, Kristen Whitney, Camy Boehling, Kelly Mitchell, Sarah Miller and Dana Kahawai testified at the hearing. These employees were told by the District that all new employees were hired as temporary employees, and that they were hired into "tenure track" positions, or were otherwise led to believe that they would be moved to probationary and permanent status in subsequent years. Their testimony is credited. The fact that some Respondents were told that they would become probationary employees by their principals, or others who did not possess authority to confer such status, was misleading. Some Respondents introduced evaluations which

[1] All further statutory references are to the Education Code.

erroneously noted that they were probationary employees. This was also misleading. The District acknowledged that its practices were not ideal, and that it needed better communication with its employees. Those facts do not, however, establish that Respondents' classification as temporary employees violated the Education Code. The evaluations were not created by persons with authority to determine status. Further, the Respondents had notice that the probationary status indicated on their evaluations did not correspond with the temporary status contracts that they signed at the beginning of the school year. All Respondents were given timely proper notice of their temporary status. In addition, the evidence did not conclusively establish that the District in fact had a policy of hiring all new employees as temporary. Moreover, no such policy currently exists: the evidence showed that the District had hired employees directly into probationary status for the 2009-10 school year. Finally, the District demonstrated that all employees in temporary positions were afforded the same rights as probationary employees in this proceeding; i.e., they received proper notice and opportunity to be heard.

The evidence established that the positions that Respondents hold are lawfully defined as temporary under the Education Code.

16. Respondent Gloria Henderson is a full-time employee at Corona Del Mar High School, teaching advanced placement English Language and Psychology. She holds a single subject teaching credential in English, with an authorization in Psychology; clear multi-subject and professional administrative services credentials, and a Crosscultural, Language & Academic Development credential. Respondent Henderson also holds Masters Degrees in Education and Psychology, and she is in the process of obtaining a doctoral degree. Prior to working for the District, she taught for 15 years, at all levels; and she held an administrative position. Respondent Henderson was in a tenured position at her previous employment. She was offered and accepted her teaching position with the District in January 2008, to begin teaching on March 14, 2008. She did not know that her position with the District would be temporary before she resigned. On March 3, 2008, the District provided Respondent Henderson with an "Initial Salary Placement and Contract Status Notification" which indicated that her contract status would be temporary. Respondent Henderson did not want to sign the contract given its temporary nature, however, the principal assured her that all teachers start that way and she would eventually move into a tenured position. Respondent Henderson ultimately signed the contract. The District included two additional forms in Respondent Henderson's personnel file: a "Position Control for Temp Contracts," which indicated that her position was a "Temporary Leave Replacement"; and a "Certificated Salary Placement Worksheet" which stated that her position was a "Short term Temporary/Semester Contract." This document was altered to indicate that Respondent Henderson was in fact a temporary leave replacement. Respondent Henderson stated that she did not know that she was considered a short-term replacement; rather, the principal told her that her position would continue. Respondent Henderson was hired under a temporary contract in the 2008-09 school year, and was laid off. She was rehired for the 2009-10 school year under a temporary contract. Respondent Henderson received timely proper notice of her temporary status for each contract.

17. Domini Possemato is an elementary school teacher with a seniority date of August 29, 2008. She contends that her correct seniority date should be August 27, 2008, because her principal instructed her to attend two staff development days on August 27 and 28, 2008. The District contended that Respondent Possemato's attendance on those days was not mandatory, and thus, should not count toward her seniority date. To support this argument, the District introduced the collective bargaining agreement, which indicates that mandatory trainings are paid on a per diem rate. Respondent Possemato received hourly payment for her service on those days.

18. Summer Keller is a sixth grade teacher at Davis Elementary, with a seniority date of August 29, 2007. She contends that her seniority date is incorrect. Respondent Keller began working for the District in August 2006, as a temporary employee. She continued as a temporary employee for the 2007-08 school year. In the 2008-09 school year, Respondent Keller became a probationary employee. The Education Code permits the District to credit one previous year for purposes of acquiring permanent status. (Sections 44917, 44920). Thus, the District's calculation of Respondent Keller's seniority date as August 29, 2007, is accurate.

19. Sara DeGrave is an elementary school teacher with a seniority date of August 30, 2006. Respondent DeGrave contends that her seniority date should be her first paid date of service in 2004; however, she resigned at the end of that school year, and was rehired in 2006. When a certificated employee resigns and is thereafter rehired, the employee's seniority date is the date of re-employment. (Section 44848; see *San Jose Teachers Assn. v. Allen* (1983) 144 Cal. App.3d 627, 641.) Thus, the District's calculation of Respondent DeGrave's seniority date as August 30, 2006 is correct.

Respondent DeGrave also contended that she can perform the duties of the "Teacher on Special Assignment (TOSA) – Technology" that Jacob Topete, a less senior employee, was retained to perform. The District articulated that it has a specific need for a TOSA-Technology who possesses the training and experience necessary to perform the job duties. Respondent DeGrave holds a Master's degree in Education with an emphasis in technology. Respondent DeGrave has never worked as a TOSA-Technology. She has served as the site technology coordinator for four years; however, the position does not require the same level of knowledge as a TOSA-Technology. When questioned about the requirements of the TOSA-Technology position, Respondent DeGrave acknowledged that there were several programs that she had not used, nor had she trained others to use. Mr. Topete has served in the TOSA-Technology position for one year. He has familiarity with all of the required programs, and has trained others in all of the programs. In addition, Mr. Topete has received extensive training to perform the TOSA-Technology position. The evidence showed that these special skills and experience are necessary to fill the District's specific need. Therefore, Respondent DeGrave does not possess the special training and experience necessary to perform the duties of the TOSA-Technology. (See *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 142.)

20. Jessica Aitken testified at the hearing.[2] Ms. Aitken is a second grade teacher at Mariner's Elementary School. She is not on the seniority list. Ms. Aitken has been employed by the District since 2005. Ms. Aitken was told that after her first year of teaching, she would be moved into a probationary, then permanent position. In all years prior to the 2009-10 school year, Ms. Aitken held temporary status positions. She is currently a long-term substitute. Ms. Aitken does not dispute her current status as a long term substitute. The evidence did not demonstrate that Ms. Aitken's current classification is incorrect.

21. Trisha Jenssen is an elementary science teacher with a seniority date of August 29, 2007. Respondent Jenssen testified on behalf of herself and other similarly situated elementary science teachers. Respondent Jenssen holds a professional clear multi-subject credential with a Crosscultural, Language & Academic Development Emphasis, and a supplement in life science. The teachers in question argue that they possess special training and experience, and should be skipped from the layoff order. They assert that the positions they hold require additional credentials beyond a multiple subject credential, which they possess, and other more senior employees, who desire to bump them from the layoff order, do not. They expressed frustration because they think the District required higher qualifications from them, that it does not seek from other senior employees who may bump them from their positions.

The District is not reducing services in the elementary science area; and it does not seek to deviate from the layoff order to retain Ms. Jenssen and other similarly situated elementary science teachers. The District maintains that other more senior employees, with either multiple subject or single subject science credentials could render the same services. The District is not required to skip employees from the layoff order, even if the junior employees have more training and experience than senior employees. Provided that the senior employees are certificated and competent to render the services of the junior elementary science teachers, Respondent Jenssen and other similarly situated science teachers may be "bumped" by the more senior employees.

22. No certificated employee junior to any Respondent was retained to render a service which any Respondent is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 9.

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[2] Ms. Aitken's name does not appear on the list of Respondents, as agreed upon by counsel, at Exhibit 4C. Nor does her name appear on Mr. Boxer's "Notice of Representation," at Exhibit ZZ. Mr. Boxer did, however, represent Ms. Aitken at the hearing, and she testified without the District's objection.

2. The services listed in factual finding number 3 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 10.

3. Cause exists under sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 22.

4. The seniority date of a certificated employee is defined as the date the employee "first rendered paid service in a probationary capacity." (§ 44845.) These words must be given their plain and commonsense meaning in order to effectuate the legislative intent. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775; *California Teachers Assn. v. Governing Bd. of Rialto Unified School District* (1997) 14 Cal.4th 627, 632-633; *Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 51-52.) The statute requires crediting a certificated employee with the seniority date on which he or she was first paid to render service in a probationary capacity. The statute does not expressly require a particular salary rate or schedule, or that the service be "mandatory." If the date on which the employee first rendered paid service in a probationary capacity is incorrect, the employee's seniority date must be adjusted to reflect the earlier first date of probationary service. (*Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1273.)

Respondent Possemato performed service in a probationary capacity for the District by attending staff development days, at the instruction of her principal, and she was paid for such service. Accordingly, the seniority dates of Respondent Possemato shall be adjusted to reflect her earlier first date of paid service in a probationary capacity; i.e., August 27, 2008.

The District points out that other administrative law judges with the Office of Administrative Hearings have arrived at a different result in layoff proceedings. (See Exhibit 20 at pp. 6-7.) Those cases are not binding on the Administrative Law Judge, and it is noted that other administrative law judges have also arrived at the same result as this decision in their layoff proceedings.

5. The Education Code permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) A certificated employee is classified as permanent, i.e., acquires tenure, if, after having been employed for two complete successive school years in a position requiring certification qualifications, he or she is reelected for the following year. (§ 44929.21, subd. (b); *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1278-1279.) Probationary employees are "those persons employed in positions requiring certification qualifications for the school year, who have

not been classified as permanent employees or as substitute employees." (§ 44915.) Substitutes are "those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent form service. . . ." (§ 44917.) Temporary employees are those requiring certification qualifications, other than substitute employees, who are employed for limited assignments, as defined in the Education Code, such as in sections 44918, 44919, 44920, and 44921. (*California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 146.)

Districts are required to provide employees with written notice of their classification when first hired. (§ 44916; *Kavanaugh, supra*, 29 Cal.4th at 911.) Section 44916 provides: "The classification [of a certificated employee] shall be made at the time of employment and thereafter in the month of July of each school year. At the time of initial employment during each academic year, each new certificated employee of the school district shall receive a written statement indicating his employment status and the salary that he is to be paid. If a school district hires a certificated person as a temporary employee, the written statement shall clearly indicate the temporary nature of the employment and the length of time for which the person is being employed. If a written statement does not indicate the temporary nature of the employment, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status." Failure to provide notice of temporary employment as required by section 44916 results in probationary service as a matter of law. (*Kavanaugh, supra*, 29 Cal.4th at p. 926.) Section 44916 does not require the District to specify which provision of the Education Code permits the teacher to be classified as temporary.

Respondent Henderson argued that the District misclassified her as a temporary employee. First, she argues that she could not have been classified as a "leave of absence (LOA) replacement" because the District was already overstaffed with temporary LOA replacements. Respondent Henderson based this theory on Board meeting minutes, which show that the District converted a number of employees from temporary to probationary status in order to comply with Section 44920. Section 44920 requires that the number of temporary employees not exceed the number of employees who are on a leave of absence. The evidence does not support Respondent Henderson's theory; rather it showed that the District had approved multiple leave of absences prior to the time period that Respondent Henderson commenced her employment; thus, the District had not exceeded Section 44920's requirements by hiring Respondent Henderson as a temporary LOA. The evidence showed that the current position that Respondent Henderson holds is lawfully defined as temporary under the Education Code.

Respondent Henderson also argued that the District should be estopped from classifying her as a temporary employee, that she should be given at least probationary status. The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another. In order for equitable estoppel to apply, the following requirements must be met: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the

estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely upon the conduct to his injury." (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Although the doctrine should be applied against the government "where justice and right require it," it cannot be applied against the government where to do so would effectively nullify a "strong rule of policy, adopted for the benefit of the public . . . ." (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at p. 493.)

Respondent Henderson has not established the elements of equitable estoppel. Respondent Henderson signed temporary contracts each year of her employment. She was not ignorant of the fact that her contracts would be temporary prior to entering into them. Although she may have been led to believe that after her first year, she would achieve probationary status, this notion was dispelled by her signing a temporary contract each subsequent year.

6. Cause exists to terminate the services of the 173 Respondents listed in Exhibit 4C, by reason of factual finding numbers 1 through 22, and legal conclusion numbers 1 through 5.

ORDER

The Accusations are sustained and the District may notify Respondents listed in legal conclusion number six that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services.

DATED: May 17, 2010

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AMY C. LAHR
Administrative Law Judge
Office of Administrative Hearings