

BEFORE THE  
GOVERNING BOARD OF THE  
ROWLAND UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In The Matter Of The Accusation Against:

OAH No. L2008030262

Marilyn Chandler, Norma Ruth Llerena, and  
Erin M. Murphy,

Respondents.

**PROPOSED DECISION**

This matter was heard by Mark E. Harman, Administrative Law Judge of the Office of Administrative Hearings, State of California, on April 18, 2008, in Rowland Heights, California.

Jonathan A. Pearl, Attorney at Law, represented the Rowland Unified School District (District). Glenn Rothner, Attorney at Law, represented Marilyn Chandler, Norma Ruth Llerena, and Erin M. Murphy (Respondents).

The District decided to reduce or discontinue certain educational services and gave Respondents and other certificated District employees notice of its intent not to reemploy them for the 2008-2009 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2008-2009 school year.

Oral and documentary evidence was received. The record was left open until April 23, 2008, to allow Respondents, and April 24, 2008, to allow the District, to submit post-hearing briefs. Both briefs were timely received and considered by the administrative law judge. The matter was submitted for decision on April 25, 2008.

**FACTUAL FINDINGS**

1. Maria G. Ott, Ph.D., is the Superintendent of the District and filed the Accusation in her official capacity.
2. Respondents are certificated employees of the District.

3. The Governing Board of the District (Governing Board) adopted Resolution No. 104 on March 4, 2008, reducing or eliminating the following services for the 2008-2009 school year:

PARTICULAR KINDS OF SERVICES	NO. OF FULL TIME EQUIVALENT (FTE) POSITIONS
<u>Certificated Management</u>	
Coordinator of Special Education	1.0
Elementary School Vice Principal	3.0
Intermediate School Vice Principal	1.0
High School Vice Principal	3.0
<u>Certificated K- Adult Instructional and Support Programs</u>	
Project Specialist	1.0
Nurse	2.0
School Psychologist	2.0
Adaptive Physical Education Teacher	1.0
Total	14.0

4. On March 4, 2008, the Superintendent notified the Governing Board that she had recommended that notice be provided to 13 certificated employees of the District, including Respondents, that their services would not be required for the next school year because of the elimination or reduction of particular kinds of services.

5. On March 5, 2008, the District served a written "reduction in force" notice (RIF notice) on 13 certificated employees, including Respondents, that their services would not be required for the 2008-2009 school year due to the elimination or reduction of particular kinds of services.

6. Respondents and certificated employee Irene Cox requested a hearing to determine if there was cause for not reemploying them for the 2008-2009 school year. Irene Cox rescinded her request for a hearing on March 19, 2008. Certificated employee Michael Florido did not request a hearing. The District was able to reassign all certificated management employees who received notices.

7. On March 21, 2008, the District issued the Accusation and served it on each of the Respondents. Respondents filed their notices of defense in a timely manner.

8. All prehearing jurisdictional requirements have been met.

9. 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 (the Code) section 44955.<sup>1</sup>

10. The Governing Board took action to reduce the services set forth in factual finding number 3 primarily because of the uncertainty surrounding State funding. 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.

11. The reduction or discontinuance 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 Governing Board.

12. On March 4, 2008, the Governing Board adopted criteria for determining order of seniority of those employees with the same date of first paid service (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.

13a. Respondent Norma Llerena (Llerena) has been working as a psychologist for the District during the 2007-2008 school year. She does not dispute that her seniority date is August 27, 2007. Following the District's decision to reduce 2.0 FTE positions of psychologist services for the 2008-2009 school year, the District gave a RIF notice to Llerena as the last school psychologist hired. Since there was one vacant position, the District did not give a RIF notice to any other District psychologist. At the hearing, Llerena challenged the accuracy of the District's seniority list.

13b. Llerena contends that the first date of paid service assigned to Olga Sosa (Sosa), a certificated school psychologist and District employee, is incorrect, that the District employed Sosa on March 17, 2007, as "a substitute, and therefore, temporary, employee for the remainder of the [2006-2007 school] year,"<sup>2</sup> and that the District had misclassified Sosa's 2006-2007 employment as probationary. Llerena thus contends that Sosa's seniority date is August 27, 2007, the same as Llerena's. The District maintains that Sosa's seniority date is March 12, 2007, and that Sosa is a more senior psychologist whose position is not being eliminated by the District. Both Llerena and Sosa are identified in the District's seniority list as "PROB 1" employees, i.e., employees in their first year of probationary status.

13c. In support of her challenge, Llerena relies on the District's records, which indicate Sosa was hired during the second half of the 2006-2007 school year to fill a position

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<sup>1</sup> Further undesignated section references are to the Education Code.

<sup>2</sup> Post-hearing brief filed by Respondents' counsel on April 23, 2008, page 2.



of an employee who had resigned. Sosa's contract for the 2007-2008 school year indicated she was hired as a probationary employee at that time. The records include: (a) a District Personnel Requisition indicating Sosa was hired under a temporary contract to begin work on March 12, 2007, to replace an employee who resigned; (b) the District's Contract and Offer of Temporary Employment, accepted by Sosa on March 6, 2007, which states the District was offering employment to Sosa "as a temporary teacher" to perform "temporary services" for the 2006-2007 school year to begin on March 12, 2007, and end on June 30, 2007, and that, "subject to acceptance" and "ratification," Sosa was "classified by the Board of Education as a temporary employee pursuant to applicable Education Code sections;" and (c) the District's Initial Offer of Employment as a Probationary Employee, accepted by Sosa on May 9, 2007, indicating that the District offered Sosa "employment as a probationary certificated employee in the position of school psychologist for the 2007-08 school year. Your services with the District will begin on 8/27/07." Thus, the District's own contracts classified Sosa as a temporary employee for the 2006-2007 school year and as a probationary employee for the 2007-2008 school year. The first date of paid service for all probationary employees hired for the 2007-2008 school year was August 27, 2007. The code provides, in relevant part, that: "As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof." (§ 44955, subd. (b).) The District admittedly has not determined the order of termination between Llerena and Sosa based on application of the District's tie-breaking criteria. Llerena, therefore, asserts that the District may not terminate Llerena.

13d. The code authorizes the Governing Board to hire and classify its employees, but also imposes limitations on its decisionmaking power. The 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. (§ 44915; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1280 . . . (*Bakersfield*).)" (*Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 975 (*Vasquez*).) In *Bakersfield*, the Court of Appeal ruled that a district could classify teachers based only on the grounds provided in the code. (*Id.* at p. 983.) "If a certificated employee occupies a position the 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. [Citation.]" (*Id.* at p. 983, citing *Bakersfield*, 145 Cal.App.4th at p. 1299.) The issue here is whether, under the particular facts and circumstance, Sosa was a probationary employee by law at the initial time of her employment in March 2007. If so, Llerena is the most junior employee and may be terminated by the District without the application of tie-breaking criteria.

13e. The code requires a school district to classify as substitute employees those teachers employed "to fill positions of regularly employed persons absent from service," but



provides no other ground for this classification. (§ 44917.) The evidence was substantial that Sosa was hired to replace an employee who resigned, not merely absent or on leave for a long-term illness. The District's personnel requisition form and the testimony of the District's coordinator of human resources, Ms. Fisher, who was responsible for implementation of the technical aspects of the layoff, both support a finding that Sosa replaced an employee who resigned. Further, the District requested information from each staff member to ensure the accuracy of seniority dates in its records before creating the seniority list. In response, Sosa signed a document on February 6, 2008, affirming that the District's calculation of her (Sosa's) seniority date of March 12, 2007, was correct.

13f. Sosa did not occupy a position that required a temporary or substitute classification when she was first hired. Respondent has provided no statutory basis on which the District could have classified Sosa as a substitute or temporary employee in March 2007. Sosa, therefore, was a probationary employee at the initial time of her employment with the District.<sup>3</sup>

### LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 8.
2. The services listed in factual finding number 3 are particular kinds of services that could be reduced or discontinued under section 44955.
3. Cause exists for the District to reduce or discontinue the particular kinds of services listed in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils within the meaning of section 44949, as set forth in factual finding numbers 1 through 11.
4. Respondent Llerena argues that the District incorrectly assigned a seniority date to Sosa that was earlier than the date assigned to Llerena, and as a result, the District has deprived Llerena of her right to have the Board determine the order of termination as between Llerena and Sosa on the basis of tie-breaking criteria. For the reasons set forth in

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<sup>3</sup> Respondent principally relies on the District's characterization of Sosa's status in the employment contract as "temporary," and the presumption "that official duty has been regularly performed." (Evid. Code, § 664.) But "[s]ince *Balen*, appellate courts have interpreted the temporary classifications narrowly – so much so that if a teacher does not satisfy the statutory grounds for a temporary classification, the default or catchall provision of section 44915 mandates the district classify the teacher as a probationary employee. (*California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 146, 150 . . . In other words, it is no longer the case that a school district and a teacher are free to negotiate a teachers' classification in cases of a statutory gap." (*Vasquez, supra*, 159 Cal.App.4th at p. 983.) Respondent's other arguments were not persuasive.

factual finding number 13a through 13f, Respondent Llerena has failed to demonstrate that the District's calculation of Sosa's seniority date is incorrect.

5. Cause exists to terminate the services of Respondents, Marilyn Chandler, Norma Ruth Llerena, and Erin M. Murphy, for the 2008-2009 school year due to the reduction of particular kinds of services, by reason of factual finding numbers 1 through 13f, and legal conclusion numbers 1 through 4.

#### ORDER

The Accusation is sustained and the District may notify Respondents, Marilyn Chandler, Norma Ruth Llerena, and Erin M. Murphy, that their services will not be needed during the 2008-2009 school year due to the reduction of particular kinds of services.

Dated: \_\_\_\_\_

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MARK E. HARMAN  
Administrative Law Judge  
Office of Administrative Hearings