

BEFORE THE
GOVERNING BOARD
ROWLAND UNIFIED SCHOOL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of
Certain Certificated Employees of the Rowland
Unified School District,

Case No. 2010030096

Respondents.

PROPOSED DECISION

Nancy Beezy Micon, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 13, 2010, in Rowland Heights, California.

Jonathan A. Pearl, Attorney at Law, represented Maria Ott (Ott), Superintendent, Rowland Unified School District (District).

Joshua Adams and Jean Shin, Attorneys at Law, represented Respondents Raquel Bahena, Catherine Blackler, Cyndi Caffrey, Jose Camacho, Cristina Canales, Thao Cao, Mitchell Childs, Patricia Chinchilla, Margaret Frank, Monica Gutierrez, Victor Guzman, Erica Hastings, Jacqueline Hill, Nancy Jim, Maria Jimenez, Cindy Yuri Kim, Steve Krumbine, Brian Lamar, Heather Larson, Shay Lohman, Ruth Malignaggi, Paula Martinez, Diana Mendez, David Meng, Alicia Morales, James Najera, June Okawa, Amy Oliver, April Ortiz, Sylvia Poe, Guiselle Quintanilla, Patricia Reyes-Madrigal, Rosa Rodriguez, Allison Rodriguez, Vanessa Salas, Aida Sandoval, Richard Schmidt, Arron Silva, Jennifer Tan, Jose Torres, Melody Vazquez, Grace Voong, and Shirley Yang. Respondents Cyndi Caffrey, Monica Gutierrez, Diana Mendez, Alicia Morales, and Shirley Yang were not present at the hearing.

The District decided to reduce or discontinue certain educational services and gave Respondents and other certificated employees of the District 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.

Oral and documentary evidence, and evidence by oral stipulation on the record, was received at the hearing. The record was left open until April 19, 2010, to provide District with an opportunity to produce a document or documents it was directed, over objection, to produce. The document or documents referenced during the testimony of District witness Robert J. Arias, Ed.D. (Arias), District Assistant Superintendent, Human Resources, contained possible calculations that tied the decline in average daily attendance to the number of teachers being laid

off in certain categories. Counsel for Respondents was given until April 20, 2010, following review of any documents produced, to notify District whether it intended to raise any additional issues in this case. If additional issues were raised, the parties were given until April 23, 2010 to submit written closing arguments.

On April 19, 2010, District submitted written argument, four pages in length, re-asserting their objections to the document production, which is marked as District's exhibit number 12 for identification only. On April 20, 2010, Respondents submitted a request, which is marked as Respondents' exhibit A, for identification only, to present briefing on an issue.¹ On April 23, 2010, counsel for Respondents submitted written argument entitled "Certain of Respondents' Closing Hearing Brief," six pages in length, which is marked as Respondents' exhibit B, for identification only. District did not submit further argument on the issue. District's relevancy objection to the document production, for the reasons set forth in this decision, is sustained.

The matter was submitted on April 23, 2010.

FACTUAL FINDINGS

1. Ott 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 (Governing Board) adopted a Resolution, reducing or discontinuing the following services for the 2010-2011 school year:

<u>Service</u>	<u>FTE² Positions</u>
Elementary Classroom Teaching	43.0
Middle School English teaching	4.0
Middle School Life Sciences teaching	1.0
Middle School Mathematics teaching	2.0
Middle School Social Science teaching	1.0
Middle School Core teaching	1.0

¹ Issue Requested for Review: "Did the District abuse its discretion by failing to calculate the 'corresponding percentage' of certificated employees in proportion to the decline in 'average daily attendance' of students, pursuant to Educ. Code § 44955; or, alternatively, did it fail to provide responsive documentation to Respondents regarding the basis for its 'particular kind of service' layoff?"

² Full-time equivalent.

High School Art teaching	1.0
High School Business teaching	1.0
High School English teaching	3.0
High School Mathematics teaching	2.0
High School Life Sciences teaching	1.0
High School Physical Sciences teaching	2.0
High School Physical Education teaching	2.0
High School Spanish teaching	1.0
High School Social Sciences teaching	3.0
Community Day School Core teaching	1.0
Continuation School Woodshop teaching	1.0
CBET Program Specialist	0.5
Art & Music Block grant	1.0
School psychologist	1.0
AB1802 Counseling	<u>3.0</u>
Total	75.5

4. Arias notified the Governing Board of the District that he recommended that notice be provided to certain certificated employees of the District, including Respondents, that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services.

5. On March 8, 2010, the District provided notice to Respondents that their services will not be required for the 2010-2011 school year due to the reduction of particular kinds of services.

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

7. On or about March 26, 2010, the District issued the Accusation, and served it on Respondents.

8. Respondents thereafter filed timely notices of defense.

9. All prehearing jurisdictional requirements have been met.

10. At the hearing, the parties stipulated that the layoff notice issued to Mitchell Childs, Patricia Chinchilla, Erica Hastings, Steve Krumbine, Brian Lamar, Alicia Morales, June Okawa, Guiselle Quintanilla, Richard Schmidt, and Jennifer Tan had been rescinded.

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11. 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 44955.³ The parties stipulated, at the outset of the hearing, that District was not being challenged in describing its actions as a reduction or discontinuation of particular kinds of services under section 44955, subdivision (b).

12. The Governing Board took action to reduce the services set forth in factual finding number 3 primarily because of anticipated declines in State funding. The decision to reduce the above-described particular kinds of services was based on a fiscal solvency problem created by the current state budget crisis, as well as financial problems caused by declining enrollment this past school year and an anticipated reduction in projected enrollment next school year. The District is facing an estimated \$14.0 million deficit, a lawsuit that could affect its student enrollment, and declining enrollment in the District. The District's declining enrollment is only one of several factors that contribute to the District's fiscal deficit. 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 factual finding number 3, in the context of the significant anticipated decline in revenue, 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. The reduction or elimination of the FTE positions will not reduce services below mandated levels.

14. On February 23, 2010, the Governing Board of the District adopted criteria to determine the relative seniority of certificated employees who first rendered paid service in a probationary position on the same date (tie-breaking criteria). The criteria are reasonable as they relate to the skills and qualifications of certificated employees, and the District properly applied the criteria.

15. a. Respondent Cindy Yuri Kim (Kim) is an elementary classroom teacher (1.0 FTE) currently assigned to teach second grade. She disputes her seniority date of August 28, 2006. She was first employed by District during the 2005-2006 school year as a substitute teacher to replace absent regular employees. In October 2005, District offered Kim a long term assignment to substitute for a second grade teacher who was ill. Kim replaced the teacher on an on-call status on October 20, 2005 and November 3, 2005. Kim also replaced other absent teachers during the time period between October 20, 2005 and November 23, 2005. On November 28, 2005, Kim began the long term assignment to teach in the classroom of the teacher who had been ill on October 20 and November 3. Kim performed the duties of this second grade teacher from November 28, 2005 continuously to the end of the school year on June 16, 2006. Kim worked a total of 158 days as a substitute teacher during the 2005-2006

³ All further statutory references are to the Education Code.

school year, which contained 180 instructional days. She served in the long term assignment for 124 days of the school year, which corresponds to approximately 69 percent of the school year. Kim was hired by District as a probationary employee for the 2006-2007 and the 2007-2008 school years. She was given a contract as a tenured employee during the 2008-2009 school year.

b. Respondent Kim asserts that she should be retained by District because her seniority date should be the beginning of the 2005-2006 school year by virtue of application of Education Code section 44918, subdivision (a), which states: “Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.” District points out that subdivision (d) of section 44918 provides an exception when the employee provides substitute service on an on-call basis. Respondent Kim did not teach in the long term assignment for more than 75 percent of the school year before she became a probationary employee. Her substitute service on an on-call status to replace absent regular employees on a day-to-day basis between September 20, 2005 and November 23, 2005 does not apply to the calculation of the 75 percent requirement. Respondent Kim’s seniority date was therefore correctly determined to be August 28, 2006. (Ed. Code, § 44918).

16. Respondent Sylvia Poe (Poe) is also an elementary classroom teacher (1.0 FTE) currently assigned to teach second grade. She also disputes her seniority date of August 28, 2006. Poe was first employed by the District during the 2005-2006 school year as a temporary teacher. She acknowledges that she signed a temporary contract for the 2005-2006 school year, and took the place of a teacher who had taken the year off. Poe returned to teach for the District during the 2006-2007 school year. Poe believed she signed, in September 2006, a probationary contract for the 2006-2007 school year. At hearing, District produced a written contract showing that Poe had agreed to serve as a temporary teacher for the 2006-2007 school year, stating: “Your temporary services for the 2006-07 school year will begin on 08/28/2006 and end June 30, 2007.” Poe did not produce a written probationary contract to refute the District’s evidence. Poe was hired by District as a probationary employee for the 2007-2008 school year and has since continued to teach for the District without a break in service.

17. The parties stipulated that the seniority date for Respondent Patricia Chinchilla (Chinchilla) is August 28, 2006. The parties further stipulated that the seniority list would be re-ordered as a result of the corrected seniority date. In applying the tie-breaking criteria, Chinchilla is credited with three points.

18. Respondent David Meng (Meng) has a seniority date of December 1, 2008. He is tenured. He was hired by the District as a high school biology teacher during the 2008-2009

school year. For the 2009-2010 school year, the District assigned Meng to a position teaching high school Earth Science. Biology is a life science course. Earth Science is a physical science course. Meng testified, without dispute from the District, that he was incorrectly classified as teaching high school biology for the 2009-2010 school year, instead of being classified as an Earth Science teacher. District's exhibit number 11, which provides a list of all of the certificated science teachers for the District, supports Meng's testimony that he was incorrectly classified as a biology teacher. District's exhibit number 11, however, also showed that, even if the District mistakenly classified Meng's teaching assignment, Meng is the least senior high school science teacher within the District and that he could therefore be bumped from his assignment by more senior science teachers, who held credentials that would allow them to displace Meng from his position.

19. Respondents Catherine Blackler (Blackler) and Aida Sandavol (Sandavol) were employed by the District as classified employees before they became certificated. Respondents Blackler and Sandavol seek credit for the years they were employed as classified employees in order to increase their seniority.

20. No certificated employee junior to any Respondent was retained to render a service which any of Respondents 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.

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 school 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.) In this case, the District has the burden of establishing by a preponderance of the evidence cause to give final layoff notices to certificated employees given notice of this proceeding.

3. The services listed in factual finding number 3 are particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 11.

4. 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 20.

Respondents contend the District's layoff decision pertaining to its reduction of classroom teachers is invalid because the District abused its discretion by failing to calculate the "corresponding percentage" of certificated employees in proportion to the decline in "average daily attendance" of students. The record establishes that part of the decision-making included the anticipated reduced revenue from declining enrollment but that the District did not undertake the process for laying off certificated employees based on a reduction in average daily attendance provided for in 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 Education Code section 44955, 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.)

In this case, the District met its burden of establishing by a preponderance of the evidence that it proposes the reduction of particular kinds of services pursuant to Education Code section 44955, as set forth in factual finding numbers 11, 12, and 13. The parties stipulated at the outset of the hearing that there would be no challenge to the District's decision to proceed on this basis. The instant layoff decision was caused by overall budget concerns and not a simple reduction in average daily attendance (ADA). Thus, the reason for the layoff, i.e. the reduction or elimination of particular kinds of services, was correctly stated in the pertinent notices. There is nothing in Education Code section 44955 prohibiting an expected decline in student attendance from being one factor of many in the overall decision to reduce or eliminate particular kinds of services. A calculation of the "corresponding percentage" of certificated employees in proportion to the decline in "average daily attendance" is not required or relevant in order to proceed under this alternative. The District's actions were not arbitrary or capricious. The District did not abuse its discretion.

Respondents further seek a determination on the issue of whether the District provided responsive documentation to Respondents regarding the basis for its "particular kind of service" layoff. Respondents did not bring a motion to compel, and none of the discovery requests or responses were submitted in the record of this proceeding. Given that the District proceeded with the reduction of its force as a result of the reduction or discontinuation of particular kinds of services, and that the parties stipulated there would be no challenges on this basis, documentation pertaining to ADA would not be relevant.

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5. The Education Code (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 District* (2003) 29 Cal.4th 911, 916 (*Kavanaugh*).) 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 Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1278-1279 (*Bakersfield*).) 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.) “[S]ection 44915 has been understood to make probationary status the default classification for certificated employees who are not otherwise required by the Code to be classified as permanent, substitute, or temporary employees. [Citations].” (*Bakersfield, supra*, 145 Cal.App.4th at p. 1281.) Substitutes are “those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service. . . .” (§ 44917.) Temporary employees are those requiring certification qualifications, other than substitute employees, who are employed for limited assignments, as defined in the Code, such as in sections 44918, 44919, 44920, and 44921. (*California Teachers Association v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 146 (*Vallejo*).)

Employment as a substitute or other temporary status may become employment in a probationary capacity in some circumstances. “A year of employment as a temporary teacher may, in some cases, be treated as a year of probationary service for purposes of attaining permanent status if the employee is rehired for the following year ‘as a probationary employee in a position requiring certification qualifications’ (§ 44909); ‘in a position requiring certification qualifications’ (§ 44917); ‘as a probationary employee’ (§ 44918); or ‘in a vacant position requiring certification qualifications’ (§ 44920). . . .” (*Bakersfield, supra*, 145 Cal.App.4th at p. 1279, fn 11.)

Section 44918, subdivision (a), provides: “Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following year.” Section 44918, subdivision (d), provides an exception to the rule, as follows: “Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.”

In the case of Respondent Cindy Yuri Kim, she did not teach more than 75 percent of the 2005-2006 school year in a long term assignment before she became a probationary employee. She is therefore not entitled to receive probationary employee credit

under section 44918 for the year preceding her employment as a probationary employee. (§ 44918, subd. (d).) Respondent Kim's seniority date was correctly determined to be August 28, 2006, as set forth in factual finding number 15.

In the case of Respondent Sylvia Poe, the District established that she was serving as a temporary employee for both the 2005-2006 school year and the 2006-2007 school year. She signed written contracts, which informed her in writing of her temporary status. Respondent Poe was hired as a probationary employee during the 2007-2008 school year and given a seniority date, pursuant to section 44918, subdivision (a), of August 28, 2006, which provided seniority credit to Poe for the preceding year of temporary employment. Respondent Poe's seniority date was correctly determined to be August 28, 2006, as set forth in factual finding number 16.

6. Section 44955, subdivision (c) provides, in pertinent part: "[t]he governing board shall make assignments and reassignments in such manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." The statute, in subdivision (b), gives preference to employees who are permanent or have seniority: "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 service which said permanent employee is certificated and competent to render."

Sections 44949 and 44955 set forth the process through which certificated employees may be laid off following reduction or discontinuation of particular kinds of services. The statutes embody a legislative choice for seniority-based layoffs, subject to specific limitations set forth in the statutes.

In the case of Respondent David Meng, whether he was assigned a position as a life science or a physical science teacher, he was the least senior teacher on a long list of high school science teachers, who were both certificated and competent to render his services. Respondent Meng, as the least senior science teacher, would be displaced from his position, as set forth in factual finding number 18.

7. The seniority date of a certificated employee is defined as the date the employee "first rendered paid service in a probationary capacity." (§ 44845.) Since Respondents Catherine Blackler and Aida Sandoval worked in undisputed classified positions prior to their first date of paid service in a probationary capacity, none of this experience constitutes "probationary" employment in a certificated capacity and may not be credited toward seniority.

8. Respondent Patricia Chinchilla's proper seniority date is August 28, 2006, as set forth in factual finding number 17.

9. Cause does not exist to terminate the services of Respondents Mitchell Childs, Patricia Chinchilla, Erica Hastings, Steve Krumbine, Brian Lamar, Alicia Morales, June Okawa, Guiselle Quintanilla, Richard Schmidt, and Jennifer Tan, by reason of factual finding number 10, and legal conclusion numbers 1 through 8.

10. Cause exists to terminate the services of Respondents Raquel Bahena, Catherine Blackler, Cyndi Caffrey, Jose Camacho, Cristina Canales, Thao Cao, Margaret Frank, Monica Gutierrez, Victor Guzman, Jacqueline Hill, Nancy Jim, Maria Jimenez, Cindy Yuri Kim, Heather Larson, Shay Lohman, Ruth Malignaggi, Paula Martinez, Diana Mendez, David Meng, James Najera, Amy Oliver, April Ortiz, Sylvia Poe, Patricia Reyes-Madriral, Rosa Rodriguez, Allison Rodriguez, Vanessa Salas, Aida Sandoval, Arron Silva, Jose Torres, Melody Vazquez, Grace Voong, and Shirley Yang, by reason of factual finding numbers 1 through 20 and legal conclusion numbers 1 through 8.

RECOMMENDATION

1. It is recommended that the layoff notice be rescinded, and the Accusation be dismissed as to Respondents Mitchell Childs, Patricia Chinchilla, Erica Hastings, Steve Krumbine, Brian Lamar, Alicia Morales, June Okawa, Guiselle Quintanilla, Richard Schmidt, and Jennifer Tan.

2. It is recommended that the Accusation be sustained, and the District may notify Respondents Raquel Bahena, Catherine Blackler, Cyndi Caffrey, Jose Camacho, Cristina Canales, Thao Cao, Margaret Frank, Monica Gutierrez, Victor Guzman, Jacqueline Hill, Nancy Jim, Maria Jimenez, Cindy Yuri Kim, Heather Larson, Shay Lohman, Ruth Malignaggi, Paula Martinez, Diana Mendez, David Meng, James Najera, Amy Oliver, April Ortiz, Sylvia Poe, Patricia Reyes-Madriral, Rosa Rodriguez, Allison Rodriguez, Vanessa Salas, Aida Sandoval, Arron Silva, Jose Torres, Melody Vazquez, Grace Voong, and Shirley Yang that their services will not be needed during the 2010-2011 school year, due to the reduction of particular kinds of services.

3. It is recommended that the seniority list for the employees with three tie-breaking criteria points and sharing the August 28, 2006 seniority date be re-ordered pursuant to the stipulation of the parties.

DATED: May 6, 2010

Nancy Beezy Micon
Administrative Law Judge
Office of Administrative Hearings