

BEFORE THE
GOVERNING BOARD OF
THE HAYWARD UNIFIED SCHOOL DISTRICT
ALAMEDA COUNTY
STATE OF CALIFORNIA

In the Matter of the Certificated Reduction in
Force, Hayward Unified School District:

Certain Certificated Employees,

Respondents.

OAH No. N2005010610

PROPOSED DECISION

On April 20, 2005, in Hayward, California, within the Level A Conference Room of the Administrative Offices of the Hayward Unified School District at 24411 Amador Street, Hayward, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter.

Cynthia A. Schwerin, Attorney at Law, of Lozano Smith, 899 Northgate Drive, Suite 200, San Rafael, California 94903-3666, as assisted by Karen M. Rezendes, Attorney at Law, of Lozano Smith, 2000 Crow Canyon Place, Suite 200, San Ramon, California 94583-1344, represented the Superintendent for the Hayward Unified School District ("the District").

Dale Brodsky, Attorney at Law, of Beeson, Tayer and Bodine, 1404 Franklin Street, Suite 500, Oakland, California 94612, represented all respondents in this matter, except for Respondents Zarlisht Barakzoy, Stanley Booker, Thirkell Debellotte, Yvonne Holland, Dayna Hudson, Sandra Kim, and Hilary Pineda. At the hearing, the parties stipulated that although Ms. Mina Gordon did not file a request for hearing, the District accepted a claim that the teacher had certain health problems that acted as extenuating circumstances for her inability to file a request for hearing. Accordingly, the District recognized Mina Gordon as a respondent to this matter, and that Attorney Brodsky represented the interests of Respondent Mina Gordon.

Respondents Zarlisht Barakzoy, Stanley Booker, Thirkell Debellotte, Yvonne Holland, Dayna Hudson, Sandra Kim, and Hilary Pineda were not represented by legal counsel at the hearing, but each of those individuals had requested a hearing in this matter. The District's Superintendent's personnel served each of those respondents with notice of the hearing but they failed to appear for the hearing of this matter. The absent respondents, who were not represented by legal counsel, were in default pursuant to Government Code section 11520, and the hearing proceeded in their absence.

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The parties to the hearing stipulated and agreed that Andrea Hayes and Elena Stockmeyer, whose names did not appear on the printed seniority list of Respondents, were served with lay-off notices and they had filed requests for hearing. Accordingly those two individuals were included in the corps of respondents represented by Attorney Brodsky.

On April 20, 2005, the parties submitted the matter and the record closed.

STIPULATIONS

A. The Hayward Unified School District, through its administrators, and Respondents agreed and stipulated, in writing, before the hearing that:

- i. All certificated employees listed on Attachment A, as affixed hereto, are Respondents in this matter;
- ii. The certificated employees whose names appear on Attachment A were properly and timely served with preliminary notices of prospective layoff action and each respondent timely requested a hearing;
- iii. The certificated employees listed on Attachment A were properly and timely served an Accusation, Statement to Respondent, Notice of Defense, Notice of Hearing and relevant statutes;
- iv. The certificated employees listed on Attachment A made and filed timely Notice of Defense;
- v. The District appropriately took account of positively assured attrition in the form of resignations and retirements of other certificated employees as of the date of March 15, 2005;
- vi. The District rescinded layoff notices for the following individuals as a result of determination of bumping rights following the application of tie-breaking criteria to the below named certificated teachers who have the same seniority dates. After conducting a lottery for certificated teacher-employees holding the same number of points as calculated on application of the tie-breaking criteria, the following teachers are to be retained:
 - a. Schneider, Tina
 - b. Beckham, Miriam
 - c. Doss, Robert

- d. Wilson, Joscelyn
- e. Leary, Monique
- f. Gauzin, Elvia
- g. Holstein, Rachel
- h. Hetu, Yesenia
- i. Rome, Robin
- j. Martin, Teresa
- k. Pabley, Harry
- l. Olson, Peter
- m. Villanueva, Javier
- n. Freyre, Tracey
- o. Elkhouri, Constance

vii. The following certificated employees will only be subject to 0.5 F.T.E. reduction as a result of bumping rights;

- a. Rhoades, Sarah
- b. Reyes, Gerald

B. During the course of the hearing of this matter, the parties through counsel stipulated and agreed that:

i. Ms. Anne Leache, who is not a respondent, has such seniority that she may bump Respondent Matthew Clark.

ii. As to the contentions of Respondent Yesenia Dimick, the date of March 15, 2005 was a point in the current school year that marked 66 percent of the passage of the school year for the District.

FACTUAL FINDINGS

1. On or before February 9, 2005, the District's Superintendent, or her designee, presented the District's Governing Board with a recommendation that the District give notice that particular kinds of services, then offered through the District, be reduced or eliminated for the ensuing school year (2005-2006).

2. Most of the respondents to the proceeding are identified by name on the list affixed hereto as Attachments "A."¹ But by a stipulation at the hearing, the attachment was supplemented by the addition of the names of Mia Gordon, Andrea Hayes and Elana Stokamer to the list of names of affected respondents.

3. On February 9, 2005, the District's Governing Board unanimously adopted District Resolution number 0405-22.

¹ The attachment is Complainant's hearing exhibit "12," which is titled "Revised List of Respondents."

The resolution recites that, pursuant to Education Code section 44955, it has become necessary for the District to reduce and/or to discontinue, no later than the beginning of the 2005-2006 school year, particular kinds of services in the form of F.T.E. (full time equivalent) certificated positions as follows:

A. Administrative

1.0 F.T.E.	Executive Director
1.0 F.T.E.	Assistant Superintendent, Educational Support
<u>1.0 F.T.E.</u>	<u>Assistant Superintendent, Curriculum/Instruction</u>
3.0 F.T.E.	Subtotal

B. Instructional

Elementary Schools

<u>110.0 F.T.E.</u>	<u>Kindergarten to 6th Grade Classroom Teachers</u>
110.0 F.T.E.	Subtotal

Secondary Schools

1.0 F.T.E.	Industrial Arts
2.0 F.T.E.	Language Arts/History
2.0 F.T.E.	Physical Education
11.0 F.T.E.	English
3.0 F.T.E.	Social Science
2.0 F.T.E.	Art
1.0 F.T.E.	Business Education
<u>2.0 F.T.E.</u>	<u>Fine Arts</u>
24.0 F.T.E.	Subtotal

137.0 F.T.E. Grand Total

4. By individual letters, dated March 11, 2005, the District's Superintendent, Janis Duran, dispatched preliminary notices² to a number of FTE position holders, including each respondent, that the District's Governing Board had an intention to reduce or to discontinue the particular service provided by each person who received the notice. Hence, due to the prospective elimination or reduction of the particular kind of service now rendered to the District, each of the respondents learned the District would not reemploy the named individuals in the certificated positions each had worked.

Also the letter, dated March 11, 2005, which had attached to it the District's resolution and other pertinent documents, conveyed to each respondent a right to file a request for hearing "to determine if there is cause for not employing [the named respondent] for the 2005-2006 school year."

² "Notice of Recommendation That Services Will Be Terminated."

5. The written preliminary notice to respondents from the District's Superintendent and the District's resolution set out legally sufficient reasons of the District's Board's intent to eliminate the course as taught by respondents.

6. As stipulated, respondents each timely requested in writing a hearing to determine whether or not cause exists for not reemploying each respondent for the ensuing school year.

7. As stipulated, District's Superintendent timely served upon each respondent the Accusation and related documents. Each respondent filed timely notices of defense.

8. All pre-hearing jurisdictional requirements were met.

9. Ms. Cheryl Petermann, in her capacity as Assistant Superintendent for Human Resources, appeared at the hearing. She provided competent, credible and persuasive evidence at the hearing of this matter.

For the current school year, the District employs a total of about 1,232 teachers.

The prospective elimination of particular kinds of services for the 2005-2006 school year directly results from a prospective shortfall in money for the District's budget. Also, the prospective elimination of particular kinds of service is due to the declining pupil census for the district for the ensuing school year. In order to partially aid the District in crafting a reasonable budget for the ensuing school year, the Superintendent, or her designee, recommended to the Governing Board that certain certificated positions be eliminated due to lack of funds as well as lack of work for teachers for the ensuing school year.

On February 9, 2005, the Governing Board adopted a resolution that identified the particular kinds of services for the next year as a means to handle the pressing financial difficulties faced by the District.

10. Assistant Superintendent Petermann further established that upon learning that the District was required to initiate lay-off proceedings for teacher employees of the District, the assistant superintendent with her staff took reasonable and lawful steps to develop the District's seniority list for the District's teachers.

Assistant Superintendent Peterman accurately attended to identifying the District's teachers who were properly designated as provisional employees and temporary teachers. She studied and set forth on the District's 2004-2005 seniority list dates calculated as the hire dates or first date of paid service for all teachers to the District.

The Superintendent, with the aid of Assistant Superintendent Peterman, recommended that the District eliminated 137 full time equivalent positions for the ensuing school year. The decision was reached through a variety of professional personnel in consultation with the Superintendent.

Before February 23, 2005, after consulting the teachers' labor union representatives and gaining Board approval, the Superintendent's office established criteria as a tie-breaking mechanism for teachers who have the same date of paid service to the District so as to develop the District's seniority list for the year 2004-2005. On February 23, 2005, the Board adopted Resolution No. 0405-28 that set forth in an appendix criteria for tie-breaking for contests regarding seniority where teachers had identical first days of paid service to the District. The District's tie-breaking criteria was grounded upon purely objective criteria to address pressing needs of the District, which was led by a goal to retain teachers with certified skills and training in Spanish language instruction as evidenced through a teacher's possession of a BCLAD certificate.

On March 11, 2005, based on the seniority list, Superintendent Janis Duran caused to be placed in the mail, notices to affected permanent and probationary teachers that their services would not be needed by the District for the next school year.

Respondents' Contentions

11. Respondents contend the District's proposed action is procedurally defective and improper insofar as the prospective layoff of the subject credentialed employees does not fully account for seniority of those persons in light of the District's retention of credentialed employees who are junior in time, or equal in time, in service to respondents. Respondents aver that the District incorrectly applied seniority dates for certain respondents by failing to account for training, experience or certification under Bilingual, Crosscultural, Language and Academic Development (BCLAD) program certificates.

Respondents assert that the lay-off proceeding is confusing because, in part, the District's financial solvency has improved over past years; yet, the District proposes to reduce the number of teacher positions greater than the number of teachers affected during the immediate past year. Respondents contend that the lay-off process exceeds that touchstone precept for layoffs, namely "necessity," and hence, such proposed over-all lay-off action is arbitrary or capricious.

Also, Respondents contend that because the Governing Board's resolution did not specify that the proposed teacher layoff was due, in part, to declining in attendance by pupils and because testimony at the hearing from the assistant superintendent indicated that the "PKS" lay-off proceeding was due, in part, to declining enrollment of pupils, Respondents asserted that they were not afforded proper notice of such basis for the layoff. Hence, respondents aver sufficient notice was not afforded them to develop a defense to the superintendent's testimony regarding declining pupil enrollment so that the entire layoff proceeding should be dismissed.

Respondents further aver that the proposed lay-off action is "overkill" as the number of teachers subject to the PKS reduction is not necessary. Respondents argue the District for the current school year was not in as grave a financial short-fall as the District confronted in past years so that for the ensuing school year, the District is not obligated to eliminate 137

F.T.E. positions. Hence, Respondents contend that the proposed lay-off action, which pertains to the elimination of particular kinds of services that involves 137 F.T.E. positions, was arbitrary and capricious.

Respondents' contentions are without merit and are rejected.

Respondents' Motion to Dismiss Accusation Against Certain Certificated English Teachers

12. Respondents argue that the Board resolution prescribes the elimination of eleven (11) F.T.E. positions for Secondary School English teachers. Respondents move that the Accusation against four more senior teachers, who received lay-off notices when a junior teacher will be retained for the next school year, should be dismissed from the proposed agency action. Respondents contend that non-reemployment of those four English teachers at the high school level, especially when the retained junior English teacher has no greater competence, training or experience as an English teacher at the high school level, is unlawful.

Facts Underpinning Respondents' Motion to Dismiss

13. The District identified 14 certificated secondary school English teachers who filled 11 F.T.E positions that were proposed for elimination. But, the District mailed preliminary notices of lay-off to only 13 of the identified teachers.

An employee named Amy Kudenov, with a first day of paid service to the District of January 21, 2004, did not received a lay-off notice. Yet, the District gave preliminary notice of lay-off to four teachers who possess earlier seniority dates as measured against Ms. Kudenov.

The four teachers with seniority dates, which were earlier than the seniority date for Ms. Kudenow, are: Laila Rall, Jennifer Munkelt, Paul Lai and Jennesis Jensen. Each of the four English teachers has a seniority date with the District of August 23, 2003.

The District offered no evidence at the hearing of this matter to prove that any of the four affected English teachers was less competent or less educated or possessed of less skill than Ms. Kudenov to teach English at the secondary school level. No evidence came into the record to show that Ms. Kudenov, although a more junior teacher to the subject four teachers, had greater ability to service the needs of the high school level English teaching program so as to be retained by the District when competent and senior employees were to be terminated.

The District did not offer competent evidence to establish that Ms. Amy Kudenov possessed skills, training or experience to warrant the District to "skip" her, as a junior teacher, to the detriment of the four English teachers, who held seniority dates earlier in time than the seniority of Ms. Kudenov. The District can not prove that no teacher is being dismissed while Ms. Kudenov, who has less seniority, is being retained to render service that the more senior teachers are certified and competent to render.

At the hearing, neither the assistant superintendent nor other administrative personnel of the District offered competent evidence on the placement of the four English teachers in relative standing among each other regarding seniority. The District's administrators did not use the Board approved criteria for tie-breaking so as to assign points to each of the four English teachers to designate relative positions on the District's seniority list.

Respondents argue the four English teachers, who have seniority dates greater than the retained junior employee, but who received preliminary notice of lay-off, should be dismissed from the Accusation.

The District proclaims that the controversy be resolved by the District retention of one of the affected four respondents by applying the "corresponding number" standard as contemplated under *Alexander v. Delano-Joint Union School District* (1983) 139 Cal.App.3d 567, 576.

Individual Respondents

14. Respondent Kerry Von Esch ("Respondent Von Esch") holds an intern certificate. She is a grade teacher at Cherryland School. She has a first date of paid service to the District on August 21, 2001. Respondent holds status under a contract with the District as an intern.

Respondent Von Esch holds a Bachelor of Science degree in Biology as well as a Bachelor of Arts equivalent in Spanish. She has a Master's degree in Education with a emphasis in "Teaching English to Speakers of Other Languages." Respondent Von Esch represents that she has taught bilingual students for her entire teaching career, which includes about three years in another state as a certificated teacher.

She has worked for the District over four years. Over the past two years, at least, Respondent Von Esch has taught a bilingual class in the District.

About a year before the hearing of this matter, Respondent Von Esch took the course for certificate as a BCLAD teacher. She passed the test for that certificate. But, as of March 15, 2005, the Commission on Teacher Credentialing had not approved the courses and qualifications of Respondent Von Esch as a holder of either a BCLAD certificate or a clear multiple subject credential.

Respondent was not persuasive that the fact that she currently teaches a bilingual class for the District equates to a status of holding an actual BCLAD certificate for the purpose of enhancing her position on the District's seniority list. Moreover, Respondent Von Esch established that only during the week immediately before the hearing of this matter had she "turned over her paper work" to the California State Commission of Teacher Credentialing for her prospective certification as a BCLAD holder and possessor of a clear multiple subject credential.

Also Respondent Von Esch was not persuasive the District should have skipped her on the seniority list due to her skills in Spanish and bilingual education.

Respondent Von Esch provides no competent evidence that the District has retained any teacher junior to her for which Ms. Von Esch possesses a credential and is currently competent to teach.

15. Respondent Maria Rosa De Altonaga ("Respondent De Altonaga") has a first date of paid service as a probationary-one teacher as of October 13, 2004. She now holds a Ryan teaching-preliminary multiple subject credential. Respondent worked during the past school year at Palma Ceia Elementary as a bilingual fifth-sixth grade "combo" teacher.

As of March 15, 2004, Respondent De Altonaga did not possess a BCLAD certificate. She plans to take the test for the BCLAD in June 2005. But, she does hold a Crosscultural, Language and Academic Development ("CLAD") certificate.

Respondent De Altonaga asserts that she is a "native speaker" in Spanish and that she initially had no plan to take testing on her language proficiency. However, she has set about to take testing for acquisition of the certificate. Yet, Respondent De Altonaga is now enrolled in a "Second Language Acquisition" course through the English learning center. But, she does not possess a bilingual teacher-in-training certificate.

Respondent De Altonaga was not persuasive the District should have skipped her on the seniority list due to her skills in Spanish and bilingual education.

Respondent De Altonaga provided no competent evidence that the District has retained any teacher junior to her for which Ms. De Altonaga possesses a credential and is currently competent to teach.

16. Respondent Susan Tabrah ("Respondent Tabrah") is a probationary-two employee with a first date of paid service to the District on August 25, 2003. During the past school year, Respondent Tabrah worked as a fifth grade English Language Development ("ELD") teacher at Burbank Elementary School.

Respondent Tabrah asserts that she holds a BCLAD certificate.

But, the ELD class that Respondent Tabrah teaches does not require that subject teacher to hold a BCLAD certification. The class taught by Respondent Tabrah is not designated as a bilingual class. She does not teach the entire class in the Spanish language. During her teaching work, Respondent Tabrah selectively aids Spanish speaking pupils in Spanish. And, Respondent Tabrah has eleven students for whom she communicates in Spanish to their parents, including writing report cards in Spanish.

Respondent Tabrah was not persuasive the District should have skipped her on the seniority list due to her skills in Spanish, bilingual education and possession of a BCLAD certificate.

Respondent Tabrah provided no competent evidence that the District has retained any teacher junior to her for which Ms. Tabrah possesses a credential and is currently competent to teach.

17. The parties stipulate and agree that Respondents Piet Best and Gloria Sifuentes are teachers-in-training for the BCLAD certificates. Although those individual teachers teach bilingual classes, those two respondents did not possess, as of March 15, 2005, BCLAD certificates.

18. Respondent Yesenia Dimick ("Respondent Dimick") holds a temporary CLAD certificate. She possesses a preliminary multiple subject credential. Respondent Dimick has a first day of paid service to the District as of August 26, 2002. During the past school year she taught at the Shepherd Elementary School as an ELD teacher.

Respondent Dimick accepts that under criteria for tie-breaking, the District granted her three points in determining relative seniority with other teachers who had first dates of paid service to the District as Respondent Dimick. But, Respondent Dimick is not persuasive that the District's administrative personnel failed to give her points under the criteria for tie-breaking as follows: (i) three points for all years of service to the district, (ii) two points for possession of a CLAD certificate, and (iii) one point for a Master's Degree in Education.

Respondent Dimick is not persuasive that she had an entitlement to six points, rather than three points, under the District's criteria for tie-breaking.

But, the District established that as of the date for mailing of the preliminary lay-off notices as of mid-March 2005 Respondent Dimick had not completed, at least, 75 percent of a third year as a teacher in the district. Hence, she was entitled to only two points, rather than as she contends three points, under the tie-breaking criteria regarding years of service to the District.

Also, the District showed that as of March 15, 2005, Respondent Dimick had not filed an approved CLAD certificate with the District. In fact, Respondent Dimick acknowledged that District administrators recently notified her that the District did not have on file a BCLAD certificate document before the date for failing of the preliminary lay-off notice.

Respondent Dimick was not persuasive the District should have skipped her on the seniority list due to her skills in Spanish and bilingual education.

Respondent Dimick provided no competent evidence that the District has retained any teacher junior to her for which Ms. Dimick possesses a credential and is currently competent to teach.

19. Respondent Matthew Clark ("Respondent Clark") is a probationary-one employee of the District because his first day of paid service to the District was January 17, 2004. Over the past year, Respondent Clark taught four periods of history for eighth grade classes at Chavez School. Also, he taught one period of an enrichment reading class at that school.

Respondent Clark has credentials in single subject-History and he holds a CLAD certificate. Respondent has a supplemental credential in language arts for Kindergarten through 9th grade.

Respondent Clark is troubled by the supposed bumping of his position by Anne Leache, who the District has decided not to provide a preliminary lay-off notice. But, Respondent Clark is mistaken regarding the credentials held by Anne Leache. Anne Leache has a first day of paid service to the District as of August 25, 2003, which gave her an earlier seniority date than Respondent Clark. Also, Anne Leache possesses a supplemental science credential, which is not held by Respondent Clark.

Respondent Clark provided no competent evidence that the District has retained any teacher junior to him for which Mr. Clark possesses a credential and is currently competent to teach.

20. Respondent George Kwong ("Respondent Kwong") over that past school year has taught third grade at the Schafer Park School.

In August 2002, Respondent Kwong first worked for the District as a fifth grade teacher at Harter Elementary School. He held status then as a teacher with probationary-one contract. But, on the 15th day of the academic year, Respondent was reassigned to Markham Elementary School; however, the principal at that school sought an experienced teacher so that the District's personnel officer offered Respondent Kwong options from which he decided to resign his teacher position on about October 11, 2002. Thereafter, effective on January 6, 2003, the District's administrators hired Respondent Kwong to serve as a substitute teacher.

At the hearing, the District called Mary Ellen Cote to show that for the school year 2002-2003, Respondent Kwong worked as a probationary teacher for 34 days and he worked for 105 days as a substitute teacher. Ms. Cote established that for the entire school year of 2002-2003, Respondent Kwong worked for a total of 139 days. During that school year, the District had a total of 186 days. Hence, for the school year 2002-2003, Respondent Kwong served the District for 74.73 percent of the school year, in part, as a substitute teacher.

At the hearing, Ms. Cote offered that District personnel initially erred by classifying Respondent Kwong as a probationary two teacher for the school year 2003-2004. Rather, Ms. Cote persuasively stated that for that school year Respondent Kwong should have been working under probationary-one teacher status.

On March 10, 2005, Respondent Kwong learned through a letter from Assistant Superintendent Petermann that for the current school year (2004-2005) he had been inaccurately designated a permanent status teacher. The letter informed Respondent Kwong that he correctly occupied probationary-two employee status as a teacher to the District and that he had a seniority date of January 6, 2003. The letter was dispatched by the assistant superintendent because Respondent Kwong served the District for only 74.73 percent of the school year for the first year that he worked as a teacher for the District.

Respondent's Witness on Financial Matters Pertaining to the Proposed Lay-Off Action

21. Mr. Samuel De Haven ("Union Representative De Haven") appeared at the hearing of this matter on behalf of Respondents. However, the evidence offered by him was not persuasive or reliable.

Union Representative De Haven claimed that a supposed analysis of the District's fiscal records for the current school year, past years, as well as projections into the future, indicate that the District had "saved" money for the District's general fund account, in that its financial condition improved by \$1.2 million dollars from the date of a previous interim report. Union Representative De Haven was not credible when he propounded that the District's financial condition as measured against the District's financial state one year ago warranted a lay-off that did not entail 137 F.T.E. positions, but rather a lesser number of positions and therefore a lesser number of individual teachers would be proper, equitable and lawful. Union Representative De Haven was neither persuasive nor credible with representations that in order for the District to remain financially sound for the ensuing school year that the District needed to eliminate only thirteen F.T.E. or teacher positions rather than 137 F.T.E. positions.

Union Representative De Haven's assertions regarding attrition, in the way of resignations and retirements of certificated employees since the date for dispatch of the preliminary notices, have no persuasive bearing on the Board's discretion to perfect final lay-off action against respondents subject to this matter.

The overall fiscal analysis by the Union Representative De Haven was not reliable or trustworthy. The unreliable analysis was founded upon information transmitted to the union from the sources, data or summaries of financial records other than from the District's Fiscal Services operations or the Alameda County Board of Education's appointed fiscal crisis management advisors to the District.

Further, evidence offered by Union Representative De Haven was not reliable as no evidence shows that he has expertise as a school administrator or as an expert in accounting, business management or financial analysis. Union Representative De Haven has never been involved in the actual production of a budget for a school district.

The lay-off proceeding, for which the hearing in this matter was conducted, is not the proper forum for the labor union representative to advance arguments on so-called District savings due to future contract negotiations that may entail an increase in class sizes that individual teachers will be assigned during the next school year.

The evidence offered through Union Representative De Haven has no bearing on the Governing Board's ability to issue final lay off notices to affected respondents to this proceeding.

District's Reasonable Basis to Proceed

22. During the immediate past school year, the Board has found that the District faces a prospective budget shortfall in the amount of funding from the State of California may be markedly reduced for the upcoming school year. The Board has determined that sufficient money is not available to operate the same number of teachers and administrator positions and programs during the ensuing school year. Hence, the District must prospectively reduce or eliminate a number of FTE particular kinds of services, including the positions held by many of the affected respondents.

23. Other than as set out above as to four English teachers at the high school level, no competent and credible evidence establishes that as a result of the proposed elimination of the full time equivalent positions respectively held by respondents, the District will retain any teacher who is junior to respondents to perform services for which respondents have been certificated or found to be competent to teach in such FTE positions for the next school year.

24. The recommendation of the District's superintendent and the Board's decision to eliminate or discontinue most of a total of 137.0 FTE positions, including the positions held by most of the respondents, were neither arbitrary nor capricious. Rather, the Superintendent's recommendation and the Board's decision were within the proper exercise of the District's discretion.

25. The District's proposed elimination or discontinuation of a number of FTE positions, including the positions respectively held by most of the respondents, for the ensuing school year is related to the welfare of the District and its overall student population.

26. The Board determined that it will be necessary, due to the elimination of particular kinds of services, to decrease the number of teachers before the beginning of the next academic year. The Board lawfully directed the notification to respondents of the elimination of the certificated positions held by each respondent.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to Education Code sections 44949 and 44955.

2. The District provided all notices and other requirements of Education Code sections 44949 and 44955. This conclusion of law is made by reason of the matters set forth in the Stipulations³ as well as Factual Findings 1 through 8, inclusive.

3. Evidence Code section 664 establishes a presumption that the action or official duties of a public entity, such as the District and its governing board, have been regularly performed. Respondents offer no evidence to rebut the presumption that the District has properly performed actions related to the procedures that seek the non reemployment of respondents.

4. Board Resolution 0405-22, as adopted on February 9, 2005, stated that it was the Board's determination that it was necessary to reduce or eliminate particular kinds of services for the 2005-2006 school year. A decline in average daily attendance was not cited as a basis for eliminating five full time equivalent certificated positions in the District's corps of teachers and single administrative position.

The Superintendent's preliminary layoff notice, dated March 11, 2005, stated that the reason for the notice was due to a decision "to reduce services in our schools. Unfortunately, this reduction in services makes it necessary to inform you that I have recommended to the Governing Board that your services be terminated at the close of the current school year ..." The preliminary notice, which made reference to the Board's resolution, did not mention a decline in average daily attendance as the reason for the lay-off action.

Education Code section 44955, subdivision (b) authorizes a district's governing board to terminate the services of not more than a corresponding percentage of employees whenever in any school year the average daily attendance for all schools in the first six months has declined below the corresponding period of either of the previous school year or whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year.

Education Code section 44949, subdivision (a) requires that no later than March 15 and before an employee is given preliminary notice that his or her services will not be required for the ensuing year, the governing board and the employee will be given notice by the school district's superintendent that it has been recommended that preliminary notices be given to employees and the reason for that recommendation.

The preliminary notice is intended to insure that affected employees are informed of the facts upon which they can reasonably assess the probability that they will not be reemployed. The preliminary notice must state the reasons for the recommendation. (*Karbach v. Bd. of Education* (1974) 39 Cal.App.3d 355.)

A notice that specifies both grounds, that is PKS reduction/elimination and declining average daily attendance, is suspect. (See, *Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648.) And, where a notice specifies one of the two statutory reasons for a

³ At page two, above.

teacher layoff, a governing board may not later attempt to justify dismissal on the other ground. (*Karbach v. Bd of Education, supra*, 39 Cal.App.3d 355⁴.)

A governing board's decision to reduce or eliminate particular kinds of services need not be tied to any statistical computation, such as a projected decline in the number of students in the affected district. The number of terminations by a PKS reduction of certificated employees depends entirely on the district's governing board's decision regarding how many, or which, services to reduce or to eliminate. It is wholly within the Board's discretion to determine the numbers by which the District will reduce a particular service. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627.)

The procedural defect or error in *Karbach* may be distinguished from the facts pertaining to this matter. Unlike *Karbach*, the Hayward Unified School District's Governing Board did not propose layoffs for any reason not specified in the preliminary notice as sent to certificated employees. The projection of declining pupil attendance or enrollment, as offered in evidence by the assistant superintendent, was one of a few reasons for consideration by that professional education administrator offered as the ground for teacher lay-off to the subject governing board for its decision to eliminate particular kinds of services. In this matter, the reduction of particular kinds of services was not a fraudulent, arbitrary or capricious action. (*Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal.App.3d 796.)

The Hayward Unified School District Governing Board's decision to eliminate 137 F.T.E. positions for the 2005-2006 school (which may have been based in some measure on a projected decline in enrollment of pupils for the 2005-2006 school year) was a discretionary decision that constituted a valid basis for reduction in particular kinds of service under the Education Code.

5. Education Code section 44955 establishes, in part, that the order of teacher layoff must occur "in inverse of the order in which [the employee teachers] were employed, as determined by the board in accordance with the provisions of [Education Code section] ... 44845 ..." And, Education Code section 44845, in part, states: "Every probationary or permanent employee employed ... shall be deemed to have been employed on the date upon which [s]he first rendered paid service *in a probationary position*." (Emphasis added.)

Also, Education Code section 44911 set out: "Service by a person under a *provisional credential shall not be included* in computing the service required as a

⁴ In *Karbach*, the governing board gave notice to probationary teachers that such employees would not be reemployed for the ensuing school year on the ground of a decline in average daily attendance. But, at the administrative adjudication hearing, the presiding officer allowed the board to present evidence justifying the decision to eliminate positions of the affected probationary teachers on the new theory of reduction in particular services. The Court of Appeal held that the governing board had no authority to terminate the teachers for any reason not specified in the original preliminary notice and that the proposed terminations on the ground of reduction in services were not valid.

prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district.” (Emphasis added.) Accordingly, as to a number of teachers who do not possess BCLAD certificates, yet currently teach bilingual class under a status of “teacher-in-training” did not establish a basis to require the District to award tie-breaking points under the criteria that allows points for possession of a BCLAD certificate.

Summerfield v. Windsor Unified School District (2002) 95 Cal.App.4th 1026, reflects the underpinning of the public education system that: “the numerous provisions of the Education Code [express] *the legislative preference for fully credentialed teachers* and the goal of reducing the number of teachers employed under temporary or emergency credentials.” *Summerfield* shows that an emergency credential does not accrue time in service for the attainment by such a classified teacher of permanent status. *Summerfield* cites Education Code section 45023.1, subdivision (a)(1) (which limits salary increases to credentialed teachers but not such increases for those holding emergency credentials), and Education Code section 44225.7, subdivision (c) (which directs assignment of interns to classrooms so as to diminish a District’s reliance on teachers on emergency permits).

It is important to note that Education Code section 44300 requires school districts to certify that the affected district is unable to recruit a sufficient number of credentialed teachers or interns before employing teachers on emergency credentials. And, Education Code section 44225.7 demands that “state policy directs the assignment of fully prepared teachers to California classrooms”

The scheme devised by the California Legislature would be violated, and grave wrongs would be visited upon credentialed teachers with a later hire date than the subject probationary and provisional credentialed teachers, under the arrangement sought by Respondent Von Esch, De Altonaga, Best and Sifuentes, who have not gained fully credentialed status, or are lacking full BCLAD certificate even though they are “in training.” Moreover, probationary status is not retroactively conferred to the beginning of employment of a teacher who secures a clear credential or a full BCLAD certificate during the school year after an initial contract is executed by the teacher in a status other than probationary as in the instances of several respondents hereto.

Respondents Kerry Von Esch, Maria Rosa De Altonaga, Piet Best and Gloria Sifuentes are either “in training,” prospectively certified BCLAD teachers or who do not have BCLAD certificates. Or, in the case of Respondent Susan Tabrah, that the teacher, although holding a BCLAD certificate, did not teach a bilingual class over the past school year. The Board resolution is specific that tie-breaking criteria points were to be awarded to teachers who had BCLAD certificate and actually taught bilingual classes.

The District’s Superintendent’s recommendations that underpin the District’s preliminary notices to the affected teachers were reasonable and rationale.

Respondents Kerry Von Esch, Maria Rosa De Altonaga, Piet Best and Gloria Sifuentes, and Susan Tabrah remain properly subject to receipt of a final lay-off notice.

5. As to Respondent Yesenia Dimick, that teacher was not entitled to a greater number of points under the District's tie-breaking criteria than the three points that had been granted her. When the preliminary notice was dispatched before March 15, 2005, only 66 percent of the school year had passed. Hence, she was not entitled to a point for her supposed third year as a certificated teacher with the district.

Also, Respondent Dimick was not entitled to tie-breaking points for a BCLAD certificate that was not registered by her with the County Office of Education and the District by the date for dispatch on March 11, 2005, of the preliminary lay off notices. After-acquired credentials, which are filed after the date for mailing the preliminary lay-off notice, need not be considered by a District in the lay-off action. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

Respondent Dimick was properly assigned the proper number of tie-breaking points, that is three points, under the criteria to set the final seniority list. She remains properly subject to receipt of a final lay-off notice.

6. The District properly designated Respondent George Kwong as a probationary-two employee with a seniority date of January 6, 2003. During his first year of employment with the District beginning in August 2002, Respondent Kwong worked for about one month under a contract as a probationary teacher. Then in January 2003, the District hired Respondent Kwong as a substitute teacher for the balance of the school year over the span of 105 days. For the next school year of 2003-2004, the District hired Respondent Kwong as a probationary employee.

Education Code 44918 establishes:

Any employee classified as a substitute . . . employee, who serves during one school year *for at least 75%* of the number of days the regular schools of the district were maintained in such 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 year as a probationary employee if employed as a probationary employee for the following school year. [Emphasis added.]

For the school year 2002-2003, calculating his total time as a probationary employee and the time spent as a substitute teacher, Respondent Kwong worked 74.73 percent of the school year for the District. There is no legal authority to "round-up" so as to grant Respondent Kwong additional time in service in order to reach the requisite 75 percent of the time prescribed in Education Code section 44918.

Respondent Kwong, in not serving the District "for at least 75%" of the number of days of the school year 2002-2003, did not accrue sufficient time as a substitute teacher for that school year so as to gain status as a probationary employee for his first year in the

employ of the District. For the current school term (2004-2005), Respondent Kwong is properly classified as a probationary-two employee to the District.

Respondent Kwong has no right to skip another certificated employee who is senior to him on the seniority list.

Respondent George Kwong remains properly subject to receipt of a final lay-off notice.

8. *San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627, establishes that a school district need not consider positively assured attrition that occurs between the date of issuance of the preliminary notice of a Board determination that certificated employees not be reemployed for the following school year by reason of a reduction in particular kinds of services and the date for dispatch of the final notice that determines the number of certificated employees that are to be terminated. "In PKS cases the determination of the amount by which a service is to be reduced is the determination of the number of positions to be eliminated." (*San Jose Teachers Assn. v. Allen, supra*, 144 Cal.App.3d at 636.)

Contrary to respondents' argument, the District may issue final lay-off notices to affected respondents without accounting for other teachers' retirements and resignation that occur between March 15, 2005, and May 15, 2005.

9. Respondents and the Superintendent cite as supposed persuasive authority proposed decisions from past years by administrative law judges, as adopted by other school districts as a decision of such other districts. But, such proposed decisions from past years have no precedential⁵ effect on the Hayward Unified School District in reaching determinations or an order in this matter.

Ruling on Respondents' Motion to Dismiss Accusation of Certain Certificated English Teachers

10. Respondents' motion to dismiss the Accusations against Respondents Laila Rall, Jennifer Munkelt, Paul Lai and Jennesis Jensen is sustained.

The District gave lay-off notices to those four English teachers, while the District failed to give a lay-off notice to an English teacher named Amy Kudenov, who was junior to the subject four English teachers, who are respondents in this matter.

The District cites *Alexander v. Delano Joint Union High School District* (1983) 139 Cal.App.3d 567 for the proposition that even though the District failed to give the junior

⁵ Government Code section 11425.60 establishes the authority for the adoption of a system for precedent decisions.

teacher—Ms. Kudenov—preliminary notice when the District proceeded with lay-off action against the four more senior English high school teachers that only one teacher of the more senior teachers should be dismissed from the lay-off under a “corresponding number”⁶ standard.

The District persuasively argues rejection of a “domino effect” that would effectively dismiss the Accusation against the four English teachers who have earlier seniority dates than the junior teacher who did not receive preliminary notice of lay-off.

The facts in this matter require application of the “corresponding number” standard as raised in *Alexander*.

But, because all four of the subject English teachers have the same seniority date of August 23, 2002, and as no evidence was offered as to the proper application of tie-breaking criteria under the Board’s subject resolution, proper identification of the most senior of the affected four English teachers can not accurately be made through this decision.

The controversy must be resolved by the Superintendent through use of the Board’s tie-breaking criteria that may be then followed by an objective lottery so as to ascertain top placement on seniority list ranking of one Secondary School English teacher among the four affected respondents and that such single Secondary School teacher, with a first date of paid service of August 23, 2003, shall be retained as an employee for the ensuing school year.

Sanctity of Stipulation to Dismiss Teachers from the Accusation

11. Judgments entered by a tribunal on the stipulation of the parties have the same effect as acts tried on the merits. (*John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565.)

The District stipulates to withdraw the Accusation against those certificated employees named in the Stipulations (A)(vi) and (vii) at pages two and three, above. The stipulations are binding on the parties.

Ultimate Determinations

12. Pursuant to Education Code sections 44949 and 44955 cause exists to give respondents notice of the discontinuation of full-time equivalent positions in the particular kinds of services rendered by respondents, by reason of the matters set out in Factual Findings 9, 10, 14 to 20 inclusive, 22 to 24 inclusive and 26.

⁶ “Because at least some of the persons skipped [that is, the junior employee such as Amy Kudenov] should have received the notices, a corresponding number [in this matter—one employee] of the most senior of the employees who were not employed must have been improperly given notices.”

13. The discontinuation of the subject particular kinds of service provided by each respondent relates solely to the welfare of the District and its students within the meaning of Education Code sections 44949 and 44955, by reason of the matters in Factual Finding 25.

14. Any contentions raised by respondents that are not discussed above are found to be without merit and are hereby rejected.

ORDER

1. The Accusation is dismissed, pursuant to a stipulation between the parties, as to Tina Schneider, Miriam Beckham, Robert Doss, Joscelyn Wilson, Monique Leary, Elvia Gauzin, Rachel Holstein, Yesenia Hetu, Robin Rome, Teresa Martin, Harry Pabley, Peter Olson, Javier Villanueva, Tracey Freyre, and Constance Elkhouri.

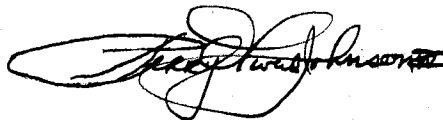
2. Pursuant to a stipulation between the parties, the Accusation is partially dismissed as against Respondents Sarah Rhoades and Gerald Reyes, who will only be subject to 0.5 F.T.E. reduction as a result of bumping rights.

3. By reason of Factual Finding 13 and Legal Conclusion 10, the matter is remanded to the Superintendent for her to use the Board's approved tie-breaking criteria, and if necessary to use a lottery, to determine seniority of the single Secondary School English teacher, as among Respondents Laila Rall, Jennifer Munkelt, Paul Lai and Jennesis Jensen, who will be retained to teach during the ensuing year. Accordingly, by May 13, 2005, the District will withdraw the Accusation, and give notice of reemployment, to the single Secondary School English teacher who acquires the paramount position on the seniority list after application by the Superintendent of the tie-breaking criteria, and if necessary lottery.

4. The Accusation served on each respondent, not dismissed from the proceeding, is sustained.

5. Other than the employees dismissed as set out in this Order, final notice may be given to those respondents identified in Attachment "A," as well as Mia Gordon, Andrea Hayes and Elana Stokamer, that their respective services will not be required for the 2005-2006 school year because of the reduction or discontinuance of the particular kinds of services by the District.

DATED: May 6, 2005



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings