

**BEFORE THE GOVERNING BOARD OF  
THE SAN MARINO UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

OAH No. L2008030387

Certificated Employees of the San Marino  
Unified School District:

CRUZ, ROCIO  
D'AMATO, ROSE  
DENG, JOSHUA  
FONG, HANNAH  
GIBSON, CATHARINE  
GLENNY, EMMA  
KEMERY, CHERYL  
KUHN, MELISSA  
LEAHY, LAUREN  
SOHN, CHRISTINE  
VALCORZA, OLIVER

Teachers of the San Marino Unified School  
District

Respondents.

**PROPOSED DECISION**

Chris Ruiz, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on April 14, 2008, at 1665 West Drive, San Marino, California.

Howard A. Friedman and Maggy M. Athanasious, Esqs., of Fagan Friedman and Fulfrost, LLP, represented the San Marino Unified School District (District).

Richard Schwab, Esq., of Trygstad, Schwab and Trygstad, represented all Respondent teachers (Respondents).

The District served a Notice of Layoff on each of the teacher Respondents. At the hearing, the District withdrew the Accusation as to Respondents Kemery and Sohn. Additionally, the District requested that it be allowed to "skip" Respondent Valcorza, or, in

the alternative, that an Order issue allowing the District to give Respondent Valcorza notice of layoff along with the remaining Respondents.

After the hearing, the record remained to allow the parties to submit briefs which were due by April 16, 2008. The District filed a closing brief which was marked as exhibit 16. Respondents filed a closing brief which was marked as exhibit C.

The issues in this case are clear. Respondents' contend that the District improperly "skipped over" Respondent Valcorza, the least senior secondary English teacher, and also that two "temporary" teachers were not given notice of layoff while other permanent teachers were given said notice.

### **FACTUAL FINDINGS**

1. Linda de la Torre, Assistant Superintendent of the District, acting in her official capacity, caused all pleadings, notices and other papers to be filed and served upon each Respondent pursuant to the provisions of Education Code Sections 44949 and 44955. The parties, by and through their counsel, stipulated that all pre-hearing jurisdictional requirements have been met, with the exception that the District contended that only Respondents Sohn, Leahy, and Kuhn properly requested a hearing. The District's contention was overruled for all the reasons set forth on the record.

2. Respondents are employed by the District as permanent, probationary, intern, pre-intern, emergency permitted, waiver, and/or temporary certificated employees of the District.

3. On March 4, 2008, pursuant to Education Code sections 44949 and 44955, the Governing Board of the District (Board) issued a written Resolution (number 10) which approved the recommendation by the Superintendent that notice be given to Respondents that their services will not be required for the ensuing school year and stating the reasons for that recommendation.

4. On March 7, 2008, Respondents were given written notice of the recommendation that notice be given to Respondents, pursuant to Education Code sections 44949 and 44955, that their services will not be required for the ensuing school year and stating the reasons for that recommendation.

5. It was established that cause exists, within the meaning of Education Code sections 44949 and 44955, for not reemploying Respondents for the ensuing school year for all of the reasons set forth below.



6. The District decided the following:

The following particular kinds of services of the District will be reduced or eliminated no later than the beginning of the 2008-09 school year:

At Risk Counselor	1	FTE <sup>1</sup>
English Teacher-Secondary	1	FTE
English Lang. Development-Elementary	.6	FTE
Elementary-General	4	FTE
Math-Secondary	1	FTE
Pre-K-Intensive Needs	1	FTE
Program Specialist-Special Education	1	FTE
Spanish-Secondary	1	FTE
Social Science-Secondary	.4	FTE
6 <sup>th</sup> Grade Social Science-English	.4	FTE

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TOTAL CERTIFICATED POSTIONS 11.4 FTE

7. The Board decided that it is necessary to decrease the number of certificated employees as a result of the reduction in services. These services are "particular kinds of services" that may be reduced or discontinued within the meaning of Education Code section 44955. The Board's decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but rather, constituted a proper exercise of discretion.

8. The reduction or discontinuation of these particular kinds of services is related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services is necessary to decrease the number of certificated employees of the District as determined by the Board. This reduction is necessary because of budget reductions.

9. The Board properly considered all known attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees as of March 15, 2008. (*San Jose Teachers Association v. Allen*

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<sup>1</sup> Full- Time Employee position(s).

(1983) 144 Cal.App. 3d 627 at 636). The District further stated its intent to withdraw layoff notices to the most senior teachers laid off if additional attrition occurs.

10. The District properly created its seniority list by determining the first date of paid service of each certificated employee and properly utilized reasonable "tie-breaker" criteria when necessary.

*"Skipping" Respondent Valcorza*

11. The District retained, or "skipped", Respondent Valcorza and gave notice to a teacher with more seniority in order to retain Respondent Valcorza. Respondent Valcorza holds a provisional internship permit to teach English, with a Cross-cultural, Language and Academic Development Certificate, commonly referred to by its acronym CLAD. Respondent Gibson was the more senior teacher affected by the "skipping" of Respondent Valcorza. Both were considered for layoff under the category "English Teacher-Secondary."

12. The District demonstrated a specific need to retain Respondent Valcorza for the coming school year. The District serves a very demanding community and the speech and debate classes, as well as the debate team, are an important component of the high-quality services the District attempts to provide the community it services. Respondent Valcorza is uniquely qualified to teach the following classes: Speech, Oral Interpretation, and Debate. These classes are different than the a standard "English" course. He also coaches the debate team which requires his unique skills and also requires travel as part of his employment. Respondent Valcorza has experience as both a debate competitor and as a debate coach. While Respondent Gibson is more senior to Respondent Valcorza, and holds a Preliminary English credential, it was not established that she has the unique skills necessary to teach these classes and/or to coach the debate team. Respondent Gibson did not testify.

13. Education Code Section 44955, subdivision (d), states:

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.



14. There is thus a two prong test under subdivision (d)(1) for skipping a junior employee: (1) a district must demonstrate a specific need for a specific course or course of study; and (2) the junior employee has the special training to teach the course which a more senior teacher does not. The District sustained its burden with respect to showing a specific need to retain Respondent Valcorza. He possesses the necessary training and experience required under Education Code Section 44955, subdivision (d), to be properly skipped.

#### *The Use of "Skipping" Rather Than Tie-Breaker Criteria*

15. Respondent Valcorza and Respondent Gibson have the same seniority date. Counsel for Respondents contended, and it was established, that if the tie-breaking criteria was used, rather than skipping, Respondent Gibson would have been retained. However, the language of the Board Resolution clearly states that the tie-breaking criteria is not applicable to "... exemptions based upon District need (skipping criteria) ..." (Resolution, exhibit 3, page 3). Thus, as the District established a specific need that only Respondent Valcorza can provide, the District is entitled to "skip" Respondent Valcorza and is not required to use the tie-breaking criteria.

#### *Temporary Teachers*

16. Respondents also contend that two temporary teachers were not given notice of layoff (employees Pinkerton and Santley). Both are employed as replacements for full-time teachers who are on leave. Both signed temporary employment contracts. Respondents did not establish that the District will be using temporary teachers for purposes not authorized by state law. Respondents did not establish that the District is classifying these employees as "temporary" in order to avoid having to include them in the layoff proceedings.

#### *Other Findings*

17. Respondents Leahy and Kuhn testified and it was established that they are dedicated and devoted to their chosen profession.

### **CONCLUSIONS OF LAW**

1. Jurisdiction for these proceedings exists pursuant to Education Code Sections 44949 and 44955.

2. Each of the services set forth in Findings 5 and 6 is a particular kind of service which may be reduced or discontinued in accordance with applicable statutes and case law.

3. The District's decision to reduce or discontinue the services is neither arbitrary nor capricious, but rather a proper exercise of the District's discretion.

4. Cause exists to reduce the District's teaching positions as described above and to give notice to the affected teachers pursuant to Education Code Section 44955. (*Campbell v. Abbot* (1978) 76 Cal.App.3d 796; *Degener v. Governing Board* (1977) 67 Cal.App.3d 689). Based on the above Findings, including the preamble to this Proposed Decision, the names of the affected teachers, those as to whom final notices of layoff may be given, are as follows:

CRUZ, ROCIO  
D'AMATO, ROSE  
DENG, JOSHUA  
FONG, HANNAH  
GIBSON, CATHARINE  
GLENNY, EMMA  
KUHN, MELISSA  
LEAHY, LAUREN

### ORDER

Because of the reductions of services, the District may give notice to the teachers identified in Legal Conclusion No. 4 that their services will not be required for the 2008-2009 school year.

Dated: April \_\_\_, 2008.

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CHRIS RUIZ  
Administrative Law Judge  
Office of Administrative Hearings