

**BEFORE THE
BOARD OF EDUCATION OF THE
SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA**

In the Matter of the Reduction in Force
Involving Certificated Employees of the
Saddleback Valley Unified School District
listed on Attachment "A,"

OAH No. 2012020428

Respondents.

PROPOSED DECISION

Administrative Law Judge Jankhana Desai, Office of Administrative Hearings, State of California, heard this matter on April 16, 2012, in Mission Viejo, California

Rutan & Tucker, LLP, by David C. Larsen, Attorney at Law, represented the Saddleback Valley Unified School District (District).

Reich, Adell & Cvitan, by Marianne Reinhold, Attorney at Law, represented the Respondents named in Attachment "A" attached hereto.

Evidence was received by stipulation, documents, and testimony. The matter was submitted on April 16, 2012.

FACTUAL FINDINGS

1. Margaret Lewis (Lewis), Assistant Superintendent of the District, filed the Accusations in her official capacity.
2. Respondents are certificated employees of the District.
3. On March 13, 2012, the Governing Board of the District (Board) adopted Resolution No. 33:11-12, which proposed to eliminate or reduce particular kinds of services encompassing 15.2 full-time equivalent (FTE) positions for the 2012-2013 school year.
4. By no later than March 15, 2012, certain certificated employees of the District, including Respondents, were given preliminary notice that their services would not be

required for the following school year, pursuant to Education Code sections 44949 and 44955.¹

5. Respondents timely requested a hearing to determine if there is cause for terminating their services. Each was thereafter served with an Accusation. Respondents timely filed Notices of Defense, which requested the instant hearing. Respondents in this proceeding are: Lynn Alexander, Bridget Down, Lauren Godfrey (Godfrey), Navaz Kerawalla, Michele Mock, Andrew Moriates (Moriates), Maria Nadal, Christina Schramm, and Lorinda Shew (Shew).² Shew was notified by the District that she would be released from employment separately and independently from the lay-off process. She was also sent a letter dated March 14, 2012, informing her that, although District records indicate that she is a temporary employee, she is permitted to participate and exercise any claimed rights to the lay-off hearing process.

6. All prehearing jurisdictional requirements have been met.

7. Resolution No. 33:11-12 (Resolution) specifically provides for the reduction or elimination of the following particular kinds of services:

<u>SERVICES OR PROGRAMS TO BE ELIMINATED OR REDUCED</u>	<u>POSITIONS (FTE)</u>
<u>Course Offerings/Instructional Program</u>	
<u>Secondary</u>	
English	4.00
Math	2.40
Social Science	2.80
Science:	
Earth Science	0.20
Biology	0.20
Intermediate School Science	0.80
Spanish	1.00
French	0.80
German	0.60
PE	0.20
Art	0.40

¹ All further statutory references are to the Education Code.

² Teacher Diane Garner appeared at hearing; however, she had not submitted a request for hearing and, therefore, was not considered as a Respondent in the instant proceeding. Teacher Claire Eichenberg (Eichenberg) had filed a request for hearing but then subsequently wrote an email on April 9, 2012, to the District indicating that she did not wish to contest her lay-off. Eichenberg, therefore, was not considered as a Respondent in the instant proceeding.

Instrumental Music	0.60
Photo	0.20
Auto	1.00
TOTAL	15.20

8. The Board's 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.

9. The reduction or discontinuance of services is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

10. The District maintains a seniority list which contains employees' seniority dates (first date of paid service in a probationary capacity), credential information, and current assignments.

11. The District used the seniority list and developed staff reduction flow charts of the least senior certificated employees currently assigned in the particular kinds of services that it was seeking to reduce in this layoff proceeding. The District then determined how many certificated employees assigned in the particular kinds of services are retiring or resigning; whether the least senior certificated employees in these particular kinds of services hold other credentials, can perform in other service areas, and are entitled to bump other more junior certificated employees; whether certain certificated employees should be skipped and retained; how many certificated employees would be bumping into each service area; and how many certificated employees in each service area must be reassigned or laid off.

12. The Resolution established tie-breaker criteria for determining the relative seniority of certificated employees who first rendered paid service on the same date. It provided that the order of termination shall be based on the needs of the District and its students in accordance with the criteria stated therein. Specifically, the tiebreaker criteria provide for points to be awarded for, among other things, certain evaluations, degrees, credentials, certificates, positions, and services. The more points awarded to a teacher, the higher the seniority within the shared date of first paid service. In the event of a tie after reference to all listed criteria, a lottery would be held.

13. Respondent Moriates challenged the application of the tie-breaking criteria. One of the tie-breaking criterion, listed as "Category G," provided that one point would be given to a teacher who served as a high school advisor. The criterion stated, "One (1) point of service for each year of service as an Elementary, Intermediate or High School Advisor as specified in Article XVIII of the SVEA Contract during the last three (3) years: (09/10, 10/11, 11/12)." The criterion does not specify that the position has to be served for the entire year in order for a teacher to receive a point pursuant to the criterion. Moriates served as the ASB advisor at Silverado High School for a portion of the 2011-2012 school year. The ASB Advisor for the 2011-2012 year was originally Kelly Tombleson (Tombleson), who then

went on maternity leave. Prior to leaving, Moriates started working with Tombleson for several months before he officially took over the position on March 9, 2012. Moriates was asked to take over the position by his school principal, David Gordon. According to the District, he will be paid the prorated portion of the stipend allocated for the ASB advisor position. Although the District's position was that Moriates would have to serve the entire year to receive the tie-breaking point, no authority was offered to support this position. Therefore, the District should have given Moriates an additional point for serving as the ASB advisor. The District must adjust his position on the seniority list to reflect the additional point.

14. Since the District had not given the ASB advisor tie-breaking criterion point to Moriates, it found Moriates, Godfrey, and McAlister, who shared the same seniority date of September 8, 2009, to be in a three-way tie and conducted a lottery on April 16, 2012, to determine their relative positions. The results of the lottery were ranked in order of Godfrey first, Moriates second, and McAlister third. However, since the District should have given Moriates the point for his service as ASB advisor, he should be ranked higher on the seniority list than Godfrey and McAlister.

15. Teacher Shew was hired to teach a categorically funded position for the current year, as well as for the 2010-2011 and 2009-2010 school years.³ Shew was employed to teach under "Title 1" federal funding. At hearing, the District explained that Title 1 funding is funding given to districts to allow students to receive free and reduced cost lunches. Shew teaches English at Los Alisos, a designated Title 1 school in the District.

16. In *Stockton Teachers Assn. CTA/NEA v. Stockton Unified School Dist.* (2012) 204 Cal.App.4th 446, the court held that in a layoff proceeding, the district had the burden of proof to establish that those teachers it claimed were temporary employees were, in fact, properly hired in a temporary capacity. The court held that to prove that laid-off employees were temporary under section 44909 (the statute authorizing school districts to hire temporary employees for categorically funded projects), the district was required (1) to show that the employees were hired to perform services conducted under contract with public or private agencies or categorically funded projects which were not required by federal or state statutes; (2) to identify the particular contract or project for which services were performed; (3) to show that the particular contract or project expired; and (4) to show that the employees were hired for the entire or remaining term of the contract or project. The court further held that if the district did not meet its burden of proof, the teachers must be classified as probationary employees, the so-called "default classification" described in *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App. 4th 460.

17. In the instant proceeding, Lewis testified that the District will be receiving Title 1 funding for the next school year, but that the District does not know the amount it will

³ Shew's temporary contract for the 2009-2010 year indicates that she was hired under section 44909 (district categorical or contract program) as well as section 44920 (replacement for certificated employee on a leave of absence).

be receiving. There was no evidence presented that the funding for the program has terminated or that the project has expired. On the contrary, Lewis testified that “funding itself is not unknown but the amount of funding is unknown.” No evidence was presented that the Title 1 funding that the District will receive will be less than what it received in the current school year. Applying *Stockton*, therefore, the District should have classified Shew as a probationary employee and her seniority date would correctly be September 13, 2010. (See section 44918.)

18. Shew’s reclassification does not impact her lay-off status; however, it does affect other Respondents. Given Shew’s probationary classification and seniority date of September 13, 2010, she would still remain junior to Moriates. Since Moriates should have been given an additional tie-breaking point, he is entitled to bump into Shew’s position.⁴ Both possess a single subject English credential, but Moriates has a seniority date of September 8, 2009.

19. The District over-noticed .40 English teachers. Hence, since Godfrey came first in the lottery, she would be entitled to the .40 position in English.

20. No other permanent certificated employee with less seniority will be retained to render a service that the Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. All notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955 were met, by reason of Factual Findings 1 through 6.

2. The services identified in the Resolution are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Board’s decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District’s schools and pupils within the meaning of Education Code section 44949.

3. A school district may reduce services within the meaning of section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167,

⁴ A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.)

178-179.)

4. Pursuant to *Stockton, supra*, the District shall reclassify Shew as a probationary employee and assign her a seniority date of September 13, 2010, by reason of Factual Findings 14 through 17.

5. The District shall allocate one additional tie-breaking point to Moriates who is entitled to bump Shew, by reason of Factual Findings 11 through 18.

6. The results of the April 16, 2012 lottery keep Godfrey in the first tie-breaking position, allowing her to serve the .40 over-noticed position in English, by reason of Factual Findings 11 through 19.

7. Cause exists, pursuant to Education Code sections 44949 and 44955, to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services, by reason of Factual Findings 1 through 20, and Legal Conclusions 1 through 3.

RECOMMENDATION

1. The District shall classify Respondent Lorinda Shew as a probationary employee and assign her a seniority date of September 13, 2010.

2. The District shall allocate one additional tie-breaking point to Respondent Andrew Moriates, provide him with the bumping rights that follow allocation of his additional point, and rescind the layoff notice and/or dismiss the Accusation as to Respondent Andrew Moriates.

3. Notice may be given to Respondents Lynn Alexander, Bridget Down, Lauren Godfrey, Navaz Kerawalla, Michele Mock, Maria Nadal, Christina Schramm, and Lorinda Shew that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2012-2013 school year. However, Respondent Lauren Godfrey shall be entitled to the serve the .40 position in English.

Dated: May 4, 2012

JANKHANA DESAI
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A: LIST OF RESPONDENTS

1. Lynn Alexander
2. Bridget Down
3. Lauren Godfrey
4. Navaz Kerawalla
5. Michele Mock
6. Andrew Moriates
7. Maria Nadal
8. Christina Schramm
9. Lorinda Shew