### BEFORE THE GOVERNING BOARD OF THE RIVERSIDE UNIFIED SCHOOL DISTRICT STATE OF CALIFORNIA

In the Matter of the Layoff/Accusation Against:

OAH No. 2010030980

200 CERTIFICATED EMPLOYEES,

Respondents.

# **PROPOSED DECISION**

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, at Riverside, California on April 26 and 30, 2010.

Bradley E. Neufeld, Esq. of Gresham, Savage, Nolan & Tilden, PC represented the Riverside Unified School District (the district).

Marianne Reinhold, Esq. of Reich, Adell & Cvitan represented all respondents who participated in the hearing with the exception of Teri Stamen, Taryn Ontiveros and Terrilyn Bresette-Neve.

William J. Ward, Esq. represented respondent Teri Stamen (respondent Stamen).

Taryn Ontiveros and Terrilyn Bresette-Neve represented themselves.<sup>1</sup>

Oral and documentary evidence was received and the matter was submitted on April 30, 2010.

# FACTUAL FINDINGS

1. On February 1, 2010, the Governing Board of the district (the board) adopted Resolution number 2009/10-32, determining that it would be necessary to reduce or

<sup>&</sup>lt;sup>1</sup> Taryn Ontiveros participated in part of the hearing and then left the hearing after determining that she had no issues pertaining to these proceedings. Terrilyn Bresette-Neve discussed her issue(s) with district representatives and elected not to participate in the hearing.

discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Elementary Teachers: Class Size Reduction (3d Grade)	51.0
Elementary Teachers: Class Size Reduction (K-2)	73.0
Total FTE positions to be reduced or eliminated	124.0

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

2. On February 1, 2010, the board adopted Resolution number 2009/10-36, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Elementary Teachers	36.0
Total FTE positions to be reduced or eliminated	36.0

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

3. On February 16, 2010, the board adopted Resolution number 2009/10-45, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Assistant Principals	34.0
Instructional Services Specialist	14.0
Total FTE positions to be reduced or eliminated	48.0

4. On February 16, 2010, the board adopted Resolution number 2009/10-40, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Business Teacher	1.0
Elementary Teachers	8.0
English Teachers	9.0
Home Economics Teachers	3.0
Mathematics Teachers	4.0
Music Teachers	3.0
Science Teachers	4.0
Social Studies Teachers	8.0
Spanish Teachers	5.0
Special Education Teachers	7.0
Visual Arts/Art Teacher	1.0
Total FTE positions to be reduced or eliminated	53.0

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

5. On February 16, 2010, the board adopted Resolution number 2009/10-46, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Elementary Teachers: Class Size Reduction (K-3)	19.0
Total FTE positions to be reduced or eliminated	19.0

6. On March 1, 2010, the board adopted Resolution number 2009/10-48, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Counselors	4.0
Total FTE positions to be reduced or eliminated	4.0

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

7. On March 1, 2010, the board adopted Resolution number 2009/10-49, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Art Teachers	6.0
English Teachers	15.0
French Teacher	1.0
Health Teachers	2.0
Home Economics Teachers	1.8
Mathematics Teachers	14.0
Science Teachers (Life and Physical)	14.0

Social Studies Teachers	14.0
Spanish Teachers	6.0
Total FTE positions to be reduced or eliminated	73.0

8. On March 1, 2010, the board adopted Resolution number 2009/10-50, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Elementary Teacher	0.6
English Teachers	11.8
Health Teacher	0.8
Home Economics Teacher	0.2
Mathematics Teachers	2.8
Physical Education Teacher	0.8
Science Teacher (Life)	0.6
Science Teacher (Physical)	0.8
Social Science Teachers	2.6
Spanish Teachers	2.0
Special Education Teacher	0.2
Total FTE positions to be reduced or eliminated	23.2

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

9. On March 1, 2010, the board adopted Resolution number 2009/10-51, determining that it would be necessary to reduce or discontinue particular kinds of services

(PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Business Teacher	0.6
Elementary Teachers	2.0
English Teachers	0.8
Mathematics Teacher	0.8
Science Teacher (Life)	1.4
Social Science Teacher	0.2
Special Education Teacher	0.2
Total FTE positions to be reduced or eliminated	6.0

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

10. On March 11, 2010, the board adopted Resolution number 2009/10-57, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Librarians	11.6
Total FTE positions to be reduced or eliminated	11.6

The services listed above are PKS, which may be reduced or discontinued within the meaning of Education Code section 44955.

11. On March 11, 2010, the board adopted Resolution number 2009/10-58, determining that it would be necessary to reduce or discontinue particular kinds of services (PKS) at the end of the current school year. The board determined that the PKS that must be reduced for the 2010-2011 school year were the following full time equivalent (FTE) positions:

<u>PKS</u>	<u>FTE</u>
Adult Education	18.0
Total FTE positions to be reduced or eliminated	18.0

12. Based on the board's resolutions, the Assistant Superintendent, Human Resources, designee for the Superintendent of the district, recommended, with regard to the ensuing school year, that the board reduce or eliminate the specified PKS provided by the district for the 2010-2011 school year by notifying the certificated employees listed in Exhibit A, attached hereto, that their services will not be required for the 2010-2011 school year.<sup>2</sup>

13. The district's recommendations and the board's decisions to reduce or discontinue the services listed in Findings 1 through 11, above, were neither arbitrary nor capricious; rather, the recommendations and decisions were based on the projected 50 million dollar budget deficit. Thus, the board's decisions represent proper exercises of its discretion.

14. The reduction and discontinuation 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.

15. The Assistant Superintendent designated the respondents, permanent or probationary teachers employed by the district, by creating a seniority list, first selecting teachers to be laid off in the inverse of the order in which they were employed, then assigning and reassigning employment in such a manner that all employees to be retained will be retained so as to render services which their seniority and qualifications entitle them to render.

16. Prior to March 15, 2010, the certificated employees (respondents) listed in Exhibit A, attached hereto, affected by the layoffs received written notice notifying them that, pursuant to Education Code sections 44949 and 44955, their services "will be terminated at the end of the current school year:"

17. On March 26, 2010, the Superintendent of the district made and filed an accusation in his official capacity.

<sup>&</sup>lt;sup>2</sup> Originally, over 400 FTE positions were slated for layoff; however, by the second day of hearing (April 30, 2010) the number of respondents was reduced to the 200 respondents identified in Exhibit A, attached hereto. Consequently, this proposed decision focuses exclusively on the Exhibit A respondents.

18. Prior to March 15, 2010, all respondents were served with copies of the board resolutions, a Notice of Recommendation that Services Will Be Terminated, a Request for Hearing form, and copies of Education Code sections 44949 and 44955. The Notice of Recommendation that Services Will be Terminated advised respondents as follows:

"You are hereby notified that the undersigned has recommended to the Governing Board of the School District that you be given notice that your services may be terminated at the close of the current school pursuant to Education Code sections 44949 and 44955. The reasons for this action are set forth in the attached Resolutions adopted by the Governing Board on February 1, 2010.

You are advised you may request a hearing to determine if there is cause for not reemploying you for the 2010-2011 school year.

Your request for hearing must be in writing and delivered before February 19, 2010. If you fail to request the hearing on or before this date, your failure will constitute a waiver of your right to a hearing." (Exh. 25.)

19. All 200 respondents timely submitted their notices of defense requesting a hearing to determine if cause exists for not re-employing them for the ensuing year.

20. Each respondent who requested a hearing and filed a Notice of Defense was timely served with a Statement to Respondent, a copy of the Accusation, Copies of Education Code sections 44949 and 44955 and Government Code sections 11506, 11507.5, 11507.6, 11507.7 and 11520, a Blank Notice of Defense and a Notice of Hearing that properly noticed respondents of the date, time, and place of the instant hearing.

21. All prehearing jurisdictional requirements were met.

22. Respondents are certificated permanent or probationary employees of the district.

23. The district has considered, and continues to consider all positively assured attrition.

24. The layoffs will not reduce any of the district's offerings in code mandated courses below the level required by law.

25. The following issues were raised during the hearing:

a) Should respondent Melissa Gill (Gill) be allowed to "tack" on one year of seniority?

- b) Does long-term substitute experience with the district count as "Prior contracted certificated experience" with the district for purposes of acquiring one (1) tie-breaking point?
- c) Should certain training taken by some respondents prior to the start of their first school year with the district be considered in determining those respondents' seniority dates?

26. The issues set forth in Finding 25, above, do not alter the fact that the 200 respondents listed in Exhibit A, attached hereto, will remain subject to being laid off in the instant reduction in force (RIF) proceedings. Since jurisdiction in this matter only extends to a recommendation concerning the RIF, the district's relevancy objection to the evidence concerning these issues was sustained. However, there were concerns expressed about the proper forum in which such issues should be resolved, as they are important issues that relate to recall and substitute teaching order. It seems that the only procedural mechanism currently in place to address differences in opinion concerning seniority dates is by way of Writ proceedings in the Superior Court.<sup>3</sup> In order to minimize the need to resort to Writ proceedings that would only serve to further burden the already over-burdened Superior Courts, the ALJ elected to receive evidence on the seniority issues and include a recommendation concerning those issues in the instant recommendation to the board concerning the relevant RIF evidence. In view of this recurring problem in RIF proceedings the parties, through their bargaining units, are encouraged to establish administrative procedures, whether through the Office of Administrative Hearings or a similar agency, to address seniority issues when differences arise. With respect to the seniority issues presented in the instant proceedings, the evidence revealed the following:

- a) Gill was hired as an intern on July 27, 2005 and worked in that capacity until she was released from service on June 30, 2006. Gill was then rehired as a "Sub" on August 28, 2006, approximately two months after her June 30, 2006 release. Gill worked as a "Sub" for the district at Educational Options Center for 51 days and was then hired as a "Prob 1" on November 13, 2006. Given this employment history, Gill should be given credit for one year of prior service to be "tacked on" to her current seniority date.
- b) Board resolution number 2009/10-38, which was duly adopted by the board on February 1, 2010, established tie-breaking criteria that apply to certificated probationary employees with shared seniority dates. Pursuant to this resolution, criterion F provides that certificated probationary employees with "prior contracted certificated experience" with the district are credited with one (1) tie-breaking point. If, as suspected, the respondents with prior long-term substitute experience with the district worked under contract with the district for their long-

<sup>&</sup>lt;sup>3</sup> In this regard, the ALJ finds that the parties have no administrative remedies currently in place; therefore, they have exhausted their administrative remedies for purposes of pursuing Writs in the Superior Court.

term employment they should be credited with one (1) tie-breaking point for their prior teaching experience.

Testimony was presented that focused on several types of training that c) were taken by certain respondents during the summer break, prior to the start of the official school year. The trainings included new teacher training/orientation, technology training for newly designed, state of the art classrooms, GATE training, and "Houghton-Mufflin" training. The district intended to convey the information to respondents that although it was not mandatory for them to attend training in the summer, before the start of the school year, it was mandatory that they complete the training within a reasonable time after commencing their employment with the district, whether on weekends, during the school day, or after hours. District schedules for the programs revealed that there were dates for training during the school year as well as during the summer, before the school year commenced. Notwithstanding the district's intent, the evidence revealed that in numerous instances school principals provided only partial information to respondents that led them to reasonably believe that summer training, prior to the start of the school year, was mandatory so that they would be up to speed with new techniques and new technology before the first day of class. Although the respondents were paid at the contractually agreed upon reduced "in service" training rate of pay, the teachers were only aware of the fact that they were being paid for their services and assumed they were getting the reduced rate because they were not fully engaged in classroom teaching. Respondents, who were newly hired teachers, did not question the site principals about the need to attend the summer trainings because they were thankful for their employment and did not want to start out by being perceived as less than fully committed to their teaching careers. In some cases, respondents canceled pre-planned vacations, diverted their family and child care duties to others, and made other sacrifices to clear their schedules so they could attend the "mandatory" training.

Administrative Proposed Decisions regarding what constitutes the "first date of paid service" for purposes of establishing seniority dates focus on evaluating the evidence to see if the training was mandatory or voluntary and whether the teachers were paid a per diem rate of pay based on their employment contract rate of pay. However, there is no statute, regulation, or case law that expressly states that the first day of paid service has to be at per diem rate based on an employee's contractual rate of pay. Consequently, it seems that the rate of pay is only one factor to be considered in evaluating whether the training was mandatory or voluntary. Certainly, if teachers are not being paid for their training the training date can not be their first day of "paid" service. However, if they are being paid for the training, even at a reduce rate of pay, it is a "paid" day of service. The pivotal question boils down to whether the paid service is "mandatory." If it is mandatory and the teachers are paid, it is then the first day of paid service for purposes of establishing a seniority date. The district and the school site principals control the flow of information to the teachers. It is up to the district and its agents (the school principals and administrators) to make it clear to new teachers when training is mandatory. Consequently, for purposes of determining when training is "mandatory," the analysis, which is factually based, must focus upon what an ordinary, reasonably prudent, person (ORPP) in the same or similar position would have reasonably believed. In the present instance, the testimony of respondents Teri Stamen, Jamie Aballi, Danielle Wertz, and Amanda Etheredge established that they, and respondents in their same situations, reasonably believed that the summer training sessions they attended were mandatory. Their testimony further established that an ORPP in their position would have reasonably reached the same conclusions. They were paid for their attendance and they, and other respondents in the same or similar situations, should be credited with their first date of training attendance as their initial seniority dates.

27. Pursuant to the stipulation of the parties, the layoff notices were rescinded and the accusation was dismissed as to Alexander Bumpus and Mary Gonzalez; therefore, they are not listed on Exhibit A, attached hereto. Additionally, pursuant to stipulation, several seniority dates were changed with respect to certain respondents. Since those modifications have already been made and the changes do not alter the fact that those respondents remain part of the instant RIF proceedings, that information will not be set forth herein.

## LEGAL CONCLUSIONS

1. Jurisdiction for the instant proceedings exists pursuant to Education Code sections 44949 and 44955, and all notices and other requirements of those sections have been provided/met, as required.

2. The services listed in Factual Findings 1 through 11 are PKS that can be reduced or discontinued pursuant to 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.

3. Based on the Factual Findings, considered in their entirety, cause exists to reduce the number of certificated employees of the District due to the budget crisis described in Factual Finding 13.

4. Cause to reduce or discontinue services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

5. No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render.

6. Cause exists to notify all of the respondents listed in Exhibit A, attached hereto, that their services will not be needed during the 2010-2011 school year due to reduction or discontinuance of PKS

### ADVISORY DETERMINATION

WHEREFORE, THE FOLLOWING ADVISORY DETERMINATIONS are hereby made:

1. The Accusation is sustained. The district shall notify the 200 respondents listed in Exhibit A, attached hereto, that their services will not be needed during the 2010-2011 school year due to lack of funds and the resulting need to reduce or discontinue PKS.

2. The district shall re-evaluate and alter district personnel records in conformity with the recommendations contained in Finding 26.

DATED: May \_\_\_\_, 2010

ROY W. HEWITT Administrative Law Judge Office of Administrative Hearings

#### **EXHIBIT "A"**

#### **Respondents in Alphabetical Order as of April 30, 2010**

- 1) Joy Abad
- 2) Jamie Aballi
- 3) Maria Aguayo
- 4) Zachariah Aguirre
- 5) Carina Alejo
- 6) Frank Allen
- 7) Ana Andalon
- 8) Elizabeth Arceo
- 9) Patricia Ascencio
- 10) Guadalupe Avila
- 11) Ivette Barajas
- 12) Oswaldo Baraj
- 13) Angelica Barboza Dominguez
- 14) Brandi Bauder
- 15) Brendy Berry
- 16) Michelle Birchak
- 17) Roberta Blasjo
- 18) Victor Blass
- 19) Laura Boling
- 20) Terrilynn Bresette-Neve
- 21) Jaimianne Brewer
- 22) Catherine Breyer
- 23) Danica Brisco
- 24) Keren Broderick
- 25) Clarissa Brown
- 26) Longina Burroughs
- 27) Natalie Bushman
- 28) Jedidiah Butler
- 29) Michael Caliari
- 30) AneshaCamacho
- 31) Sami Cash
- 32) Krystal Cauffiel
- 33) Tracy Cauthen
- 34) Kathleen Clark
- 35) Lacey Clark
- 36) Michelle Clayton
- 37) Aaron Codiga
- 38) Joanna Contreras
- 39) Sabine Cooke
- 40) Elizabeth Copeland
- 41) April Corby
- 42) Heather Crane
- 43) Jennifer Curl
- 44) Sophie Curtin

45) Cathy Decker 46) Andrea Dedic 47) Mary DeGuzman 48) Monica Diaz-Hewatt 49) Scott Dickerson 50) Lily Dinh 51) April Donahoo 52) Robin Doneff 53) Nancy Esparza 54) Amanda Etheredge 55) Mary Everett 56) Elizabeth Faulkner 57) Heather Feeley 58) Casey Finfrock 59) Valerie Flotron 60) Sarah Francis 61) Kristal Fryan 62) Luis Fuentes 63) Kelly Gaffney 64) Deborah Garner 65) Erin Garrett 66) Daniel Genung 67) Melissa Gill 68) Edward Gonsalves 69) Daniel Gonzalez 70) Maria Gonzalez 71) Elizabeth Good 72) Wendy Gore 73) Sara Gramalki 74) Jeanette Gray 75) Charity Greenwalt 76) Kimberly Grote 77) Jalyn Guidangen 78) Timothy Hall 79) Shaun Harris 80) Billie-Joyce Hatzidakis 81) Natalie Hernandez 82) Claudia Herrera 83) Lorena Herrera 84) Heather Holland 85) Robert Hutcheson 86) Laurie Irvin 87) Jessica Jimenez 88) Casondra Johnson 89) Troy Johnson 90) Nylma Jorns 91) Philip Kasinski 92) Moira Kaufhold

93) Hermann Kieffer 94) Elizabeth Kimble 95) Jenna King 96) Kristin Kitagawa 97) Amanda Kraft 98) Christina Kras 99) Melissa Kromas 100) Delmi Lara 101) Kristina LaRochelle 102) Tracy Lawrence 103) Karla Lechuga 104) Mi Yeon Lee 105) Rene Levario 106) Lindsay Litvinoff 107) Vanessa Lopez 108) Kimberly Luginbill 109) Kimberly Lukens 110) Karina Marquez 111) Brandi Marsh 112) Marjorie Mathews 113) Stacy Mattson 114) Catherine McBride 115) Jayme McCabe 116) Karlene McCann 117) Kristina McCann 118) Kristi McCormack 119) Sara McDonnell 120) Erin Medina 121) Mary Michalak 122) Dax Mims 123) Mari Miranda 124) Dawn Monte 125) Guadalupe Morales 126) Lucrecia Moreno 127) Gloria Murrietta 128) Brandi Neal 129) Vincent Olague 130) Heather Olea 131) Taryn Ontiveros 132) LisaMarie Orosco 133) Giovanni Ortiz 134) Marissa Padilla 135) Kathleen Parker 136) Gloria Peña 137) Donna Perez 138) Viviana Perez 139) Julie Pfeiffer 140) Stephanie Pfeiffer

141) Shanda Pham 142) Marina Porras-Codiga 143) Philene Potter 144) Randi Potwardowski 145) Christina Ramirez 146) Cindy Ramos 147) Articia Reed (Wheeler) 148) Casey Richards 149) Cheryl Richardson 150) Coretta Richardson 151) Tina Ricketts 152) Jennifer Riddle 153) Tasha Runyan 154) Shiva Salehpour 155) Casey Salinas 156) Cristina Sanchez 157) Stefanie Santana 158) Matthew Saucedo 159) Kristen Schechtman 160) Kimberly Schmit 161) Kendra Schwartz 162) Julie Serna 163) Crystal Sheplor 164) Lezlie Sheskey 165) Joy Sinclair 166) Deborah Smith 167) Kristyn Smith 168) Tiffany Speck 169) Jennifer Squire 170) Teri Stamen 171) Carol Stevens 172) Marisol Stokes 173) Vanessa Stoneberg 174) Jillian Tandeski 175) Jose Tapia 176) Julie Tenette 177) Janet Terry 178) Jennifer Thomas 179) Yselle Thomas 180) Frances Torres 181) Linda Tran 182) Brandi Troxel 183) Michelle Umana 184) Tabitha Ungarayawong 185) Matthew Van 186) Alicia Vannatter 187) Vanessa Vasquez 188) Sandra Villasenor

- 189) Raphaela Wallace
- 190) Anna Waters
- 191) Danielle Wertz
- 192) Toya West
- 193) Melinda Wickstrom
- 194) Nicole Wilder
- 195) Alexia Wilson
- 196) Angelita Yadao-Payad
- 197) Sonya Younan
- 198) Lizandra Zavala
- 199) Anthony Zlaket 200) Gina Zlaket