

**BEFORE THE  
BOARD OF EDUCATION OF  
MOUNT DIABLO UNIFIED SCHOOL DISTRICT**

In the Matter of the Statement of Reduction  
in Force of:

The Certificated Employees Identified in  
Appendix A,

Respondents.

OAH No. 2019021027

**PROPOSED DECISION**

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter on April 15, 2019, in Concord, California.

Associate General Counsel Deborah A. Cooksey represented the Mt. Diablo Unified School District.

Attorney Ernest H. Tuttle III, Tuttle & McCloskey, represented all respondents.

The record was left open until April 23, 2019, for submission of written argument. Respondent's brief was marked as Exhibit B. The District's brief was marked as Exhibit 16. The record closed and the matter was submitted for decision on April 23, 2019.

**FACTUAL FINDINGS**

1. Nellie Meyer, Ed.D., made and filed the Statement of Reduction in Force in her official capacity as Superintendent of the Mt. Diablo Unified School District (District).

2. Respondents are listed on Attachment A. Each respondent is a certificated employee of the District who was issued a preliminary layoff notice. The District has rescinded the preliminary notices it issued to the following certificated employees: Kelly Duncan (0.5 FTE), Juan Paez (1.0 FTE), Linda Ruiz (1.0 FTE), and Terri Shamroukh (1.0 FTE). These four certificated employees are no longer respondents.

3. On February 25, 2019, the Board of Education of Mount Diablo School District (Board) passed Resolution No. 18/19-44 reducing or discontinuing particular kinds of services for 2019-2020 school year, and directing Superintendent Meyer to give

appropriate notices to certificated employees whose positions will be affected by the action. The resolution was based on Superintendent Meyer's report that the reductions were necessary because of the District's projected budget deficits.

4. On or before March 15, 2019, Superintendent Meyer gave written notice to respondents of the recommendation that his or her services will not be required for the 2019-2020 school year. The reasons for the recommendations were set forth in the preliminary notices.

5. Respondents filed timely requests for hearing to determine if there is cause for terminating their services for the 2019-2020 school year. A Uniform District Statement of Reduction in Force was served on respondents, all of whom are deemed to have timely filed notices of participation. All prehearing jurisdictional requirements have been met.

6. On February 25, 2019, the Board took action to reduce or discontinue the following particular kinds of services for the 2019-2020 school year:

<b>District Wide</b>	
Site Administrators	5.0 FTE <sup>1</sup>
Central Office Administrators	3.0 FTE
School Counselors	5.0 FTE
Librarians	1.0 FTE
<b>Elementary Teaching Positions</b>	
Multiple Subject	10.0 FTE
Teacher Intervention, Categorical Programs, Site Based	3.0 FTE
<b>Middle &amp; High School Teaching Positions</b>	
Middle School Core	5.80 FTE
Middle School Reading	1.20 FTE
Middle School ELD	0.80 FTE
Middle School ALD	0.60 FTE
High School Teacher Coach/Specialist	2.80 FTE
Electives	
6th Grade Rotation	0.20 FTE
Hands on Technology	0.20 FTE
Web	0.20 FTE
Leadership	1.00 FTE
Yearbook	0.20 FTE
Language Arts Lab	0.20 FTE
On Your Own	0.40 FTE

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<sup>1</sup> Full-time equivalent positions.

Enhancement (Rotation)	0.20 FTE
Service (Rotation)	0.40 FTE
World Cultures	0.20 FTE
Coding	0.40 FTE
AVID Coordinator	0.20 FTE
Academic Success	0.20 FTE
Current Events	0.20 FTE
Rotation	0.20 FTE
AVID	0.60 FTE
Instrumental Music	1.60 FTE
English	3.60 FTE
Social Science	5.40 FTE
Physical Education	2.80 FTE
French	0.40 FTE
Art	1.00 FTE
Industrial Technology	0.40 FTE
Health Careers, CTEIG Grant	0.40 FTE
Project Lead the Way, CTEIG Grant	0.40 FTE
<b>Total:</b>	<b>59.20 FTE</b>

7. On February 11, 2019, the Board passed Resolution 18/19-40, identifying the criteria to be applied to resolve ties in seniority between certificated employees. The criteria are:

1. Possession of a currently valid and properly filed credential authorizing service in special education programs
2. Possession of a currently valid and properly filed BCLAD certificate
3. Possession of a currently valid and properly filed regular credential (clear, professional clear, or preliminary)
4. Possession of a currently valid and properly filed CLAD or other valid certificate authorizing instruction to English Learners
5. Possession of a currently valid and properly filed credential or supplemental subject authorization permitting instruction in math or science
6. Possession of a currently valid and properly filed credential or supplemental subject authorization

permitting instruction in the designated subject area of industrial and technology education

7. The certificated employee whose currently valid and properly filed regular credentials authorize a broader scope of service. (This tie-breaker is to be repeated as applicable.)
8. Possession of National Board Certification
9. The certificated employee holding the highest current placement on the salary schedule. (This tie-breaker is to be repeated as applicable.)
10. The certificated employee who has taught in the most different grade levels while employed in the District not as a day-to-day substitute. (This tie-breaker is to be repeated as applicable.)
11. The certificated employee who has taught in the most different subject areas while employed in the District not as a day-to-day substitute. (This tie-breaker is to be repeated as applicable.)
12. If a tie still exists after application of criteria 1 to 11, the tie shall be broken by lot. Numbers shall be drawn with the lowest number drawn winning the tie and continuing until all remaining tied individuals are ranked in order.

8. The District's employer-employee relations specialist, Laura Emily Frizzell,<sup>2</sup> and a representative of the District's teachers' union applied the tie-breaking criteria to employees with the same seniority date. Ties between teachers with the same seniority date were resolved via lottery, and rank order was determined.

9. Prior to the application of the tie-breaking criteria and the sending out of preliminary notices, the District requested teachers to verify their first date of paid service in a probationary or permanent position, credentials, and other requested information in order to prepare the District's seniority list. Employees with concerns about the accuracy of District information raised them on the form and met with Frizzell. Frizzell conducted the District's research, made changes in the system, and notified the employee of changes. Following application of the tie-breaking criteria, the seniority list was created.

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<sup>2</sup> At the District, she goes by the name Emily Lopez Frizzell.

10. In Resolution No. 18/19-44 the Board identified a “direct and specific need” for certificated employees qualified to serve the needs of students with respect to the following:

- a. Courses requiring Bilingual Cross-Cultural Language and Academic Development (BCLAD) certificates, which are highly specialized programs requiring the possession and utilization of additional specialized certificates and/or credentials.
- b. Bilingual School Counselors
- c. International Baccalaureate Training and Experience
- d. Adaptive Physical Education credential or supplementary authorization

And in this resolution, the Board adopted the following competency criteria for this layoff:

“Competency” for the purpose of Education Code section 44955 shall be determined solely upon current possession of a preliminary or clear credential for the subject matter or grade level to which the employee will be assigned at the beginning of the 2019-2020 school year.

11. Before issuing the preliminary layoff notices, the District took into account all positively assured attrition.

12. Since issuing the preliminary layoff notices, the District reduced the number of noticed certificated employees based on being informed that four additional certificated employees will be retiring or resigning from the District. (Finding 2.) This reduces the reduction in services affected by this proceeding to 55.70 FTE.

13. The District will take into account any additional attrition before issuing final layoff notices.

*Classification of Kathleen Koch as a probationary teacher*

14. Kathleen Koch is a probationary 1 employee of the District with a seniority date of August 9, 2018. For 2018-2019 school year, Koch held a 1.0 FTE position as a secondary school teacher. Koch was assigned to teach work experience, cyber high, and physical education at Concord High School. Koch received a preliminary layoff notice.

15. Koch started her very lengthy career with the District in August 1974. She retired from the District after the 2009-2010 school year in order to provide full-time care to her mother, and began to draw retirement benefits through the California State Teachers' Retirement System. When she retired, Koch did not understand and believes she was not told that in order to retain her permanent status with the District she would have to return to work full-time within 39 months of retirement. (Ed. Code, § 44931.)

16. During her retirement, Koch worked as a temporary employee for the District teaching work experience at Concord High School. Koch worked on a 0.40 FTE temporary contract each year from November 2010 through the 2017-2018 school year.

17. Koch rescinded her retirement and returned to full-time employment for the District in the 2018-2019 school year. Koch made the decision to un-retire after performing due diligence regarding consequences to, if any, past or future retirement income and social security, and confirming her employment status with the District. Koch's goal was to work two more years in order to increase her years of service with the District and thereby increase her retirement benefit.<sup>3</sup> At that time, she made more money being retired, and working part-time, than she would by working full-time and not drawing retirement and social security.

18. The District advised Koch that she would maintain her employee number, be paid at the top of the salary schedule, and most importantly to her, would be classified as a permanent employee. According to Koch, being a permanent employee was the final piece for her decision to un-retire. The District confirmed she would be classified as a permanent employee in a Certificate Personnel Assignment signed by Lisa Murphy Oates, Executive Director of Human Resources, on July 9, 2018.

19. On November 26, 2018, Oates notified Koch that the District had made a mistake in her classification. Since more than 39 months had passed since she retired, by law, the District was required to classify her as a new probationary employee.

20. Had Koch known of the 39-month rule, she would have and could have unretired within that time frame. Koch feels that she was misled by the District, and that she should be reclassified as permanent.

#### *Seniority of Katherine Koch*

21. Koch's seniority date is August 9, 2018, and she is ranked No. 201 on the Seniority List. In addition to holding a clear career technical education teaching credential, Koch holds a life standard designated subjects teaching credential in public safety education; a life standard elementary teaching credential, in physical education (academic) and social science (sociology); and a life standard secondary education credential, physical education

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<sup>3</sup> Koch understood that her retirement benefit would increase by \$1,100 per month for the remainder of her life, and that she would not have any pay back requirement for the retirement she had drawn.

(academic) and social science (sociology). Koch also has a Cross-Cultural Language and Academic Development (CLAD) Certificate. Koch testified that, and there is no evidence to the contrary, that she is credentialed and competent to be an elementary teacher for the District.

22. Koch has the same seniority date as elementary teacher Jennie Jenkins, who is placed higher than her on the seniority list at rank No. 191. Jenkins was not issued a preliminary notice.

Koch argues based on the tie-breaking criteria she should have had seniority over Jenkins. Jenkins holds a clear Multiple Subject credential, a CLAD certificate, and a supplemental subject authorization to teach math. The supplemental authorization to teach math is the fifth highest tie-breaking criteria, and is ranked higher than Koch's subject authorizations. The evidence does not establish that Koch's placement on the seniority list was the result of an erroneous application of the tie-breaking criteria.

23. Koch has the same seniority date as elementary teachers Armita Marshall and Amanda Oscamou. Marshall is No. 214 on the seniority list, Oscamou is ranked No. 215. Neither Marshall nor Oscamou was issued a preliminary layoff notice. Marshall occupies a 0.20 FTE position. She holds a clear Multiple Subject credential and a CLAD Certificate. Oscamou occupies a 1.0 FTE position. She holds a clear SB 2042 multiple subject teaching credential and a CLAD certificate.

24. The undisputed evidence is that Koch is credentialed and competent to teach elementary school. The undisputed evidence is that Koch is senior to Marshall and Oscamou, who are being retained. The District is thus violating the seniority rules in noticing Koch while retaining teachers that are junior to her.

#### *Seniority dates of certificated employees hired for the 2018-2019 school year*

25. A certificated employee's seniority begins with the date he or she "first rendered paid service in a probationary position." (Ed. Code, § 44845.)

26. Teachers new to the District were expected to attend a New Staff Orientation on August 9, 2018. Sign-in sheets were circulated at the various workshops held that day. It was considered by the District to be the first day of paid service, and is the seniority date of many District teachers, including Jenkins.

27. Respondents' argue that Jenkins was given an incorrect seniority date because she did not attend the New Staff Orientation. As proof of her nonattendance, respondents rely on the sign-in sheets which were not signed by Jenkins. That Jenkins did not sign-in, does not prove that she did not attend the training; she could have attended and not signed in. But even if Jenkins did not attend the New Staff Orientation, it does not mean that the District erred in assigning her an August 9, 2018 seniority date: the District may well have approved Jenkins absence from this orientation.

28. Leslie Ellingson attended the New Staff Orientation on August 9, 2018, and that is her seniority date. She does not claim any error associated her seniority date. Ellingson is an elementary teacher, and was given a layoff notice.

29. Ellingson identified three other new teachers to the District, teachers that she did not see in attendance at the New Staff Orientation. Each of the teachers Ellingson identifies were also given a lay-off notice. Therefore, if there are errors in seniority dates, it impacts Ellingson's rehire rights, something she cannot raise in this layoff proceeding. As a point in fact, however, two of the teachers Ellingson identified as not attending the New Staff Orientation have been assigned a later seniority date of August 14, 2018.<sup>4</sup>

#### *Conclusion*

30. All additional contentions made by respondents not addressed above are found to be without merit and rejected.

31. Other than Koch, no certificated employee junior to any respondent is being retained to perform services which any respondent is certificated and competent to render.

32. The reduction or discontinuance of services is related solely to the general welfare of the schools and the pupils thereof.

### **LEGAL CONCLUSIONS**

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955.<sup>5</sup> All notices and jurisdictional requirements contained in those sections were satisfied. (Findings 4 & 5.)

2. The services listed in the Board's resolution (Finding 6) are the kind which may be reduced or discontinued in accordance with applicable statutes and case law. (See Ed. Code § 44955; *Campbell Elem. Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.) The decision to reduce or discontinue the services is neither arbitrary nor capricious but rather a proper exercise of the District's discretion.

#### *Katherine Koch: Classification*

3. Koch contends that the District improperly classified her as a probationary teacher for the 2018-2019 school year. Because her break in service was more than 39

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<sup>4</sup> Respondents Rakel Cromwell and Paul Hassel.

<sup>5</sup> All further statutory citations are to the Education Code.

months, she does not retain her seniority rights. (Ed. Code, § 44931; *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 614.) Koch is required to complete two consecutive years in a position requiring certification qualifications in order to be classified as permanent the following year. (Ed. Code, § 44929.21, subd. (b).)

4. Koch contends that the District should be precluded from classifying her as probationary because it promised her orally, and in writing on Certificated Personnel Assignment, that she would be classified as a permanent employee of the District. Teaching classifications are set by the Education Code, not the District. While there is no question that Koch was misinformed by the District about her classification upon un-retiring, teacher classification is determined by law. (*Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, 488; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260.) The District was acting in accordance with the requirements of the Education Code when it corrected the classification error and classified Koch as a probationary employee. There is no legal basis for changing that classification in this proceeding.

#### *Katherine Koch: Seniority*

5. Education Code section 44955, subdivision (b), provides:

Except as otherwise provided for by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

The District must follow the requirements of this section in issuing its final notices to effectuate the reduction in elementary teaching services. It is undisputed that Koch is senior to two other elementary teachers who did not receive a layoff notice. It is undisputed that she is credentialed and competent to render this service. Under these circumstances, Koch's services to the District may not be terminated. (*Ibid.*)

#### *New Teacher Orientation/Seniority Date Issues*

6. Respondents contend that the District failed to correctly set the seniority date of some of the new teachers hired for the 2018-2019 school year. Seniority dates are based on the first day of paid service in a probationary position. (Educ. Code, § 44845.) The evidence failed to establish that the District improperly set seniority dates as claimed.

#### *Conclusion*

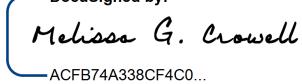
7. Cause exists because of the reduction or discontinuance of particular kinds of services pursuant to Education Code section 44955 to give notice to respondents, other than those identified in Finding 2 and Legal Conclusion 5, that their services will not be required

for the ensuing school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949.

## RECOMMENDATION

1. By reason of the matters set forth in Finding 2 and Legal Conclusion 5, respondents Kelly Duncan, Kathleen Koch, Juan Paez, Linda Ruiz, and Terri Shamroukh, are dismissed from this reduction in force proceeding. These certificated employees must be retained for 2019-2020 school year.
2. Except as provided above, notice may be given in reverse seniority order to respondents occupying up to 55.70 full-time equivalent positions that their services will not be required for the 2019-2020 school year because of the reduction of particular kinds of services.

DATED: May 2, 2019

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MELISSA G. CROWELL  
Administrative Law Judge  
Office of Administrative Hearings

**Attachment A**  
**MDUSD 2018/19 LAYOFF RESPONDENTS**

3/26/2019 1:45 PM  
RECEIVED BY OAH

Aberle, Matthew  
Ahonen, Kirsten  
Anderson, Laurie  
Ballard, Christina  
Bergen, Adele  
Beuchotte, Elizabeth  
Cabatingan, Marissa  
Cary, Jillian  
Clemmons, Steven  
Crider, Danielle  
Cromwell, Rakel  
Davis, Cody  
Dillman, Nicole  
Duncan, Kelly  
Edmonson, Kristina  
Ellingson, Leslie  
Flanagan-Schmidt, Julia  
Glenn, Kelly  
Hamachi, Patricia  
Hassel, Paul  
Henry, Colleen  
Johnson, Ashley  
Katibah, Anna  
Kellerhals, Leah  
King, Ali  
Koch, Katherine  
Laurora, Douglas  
Litton, John  
Mason, Vontre  
McCall, Denise  
McDonagh, Elizabeth  
McFerrin, Erin  
Morgado, Rachel  
Najera, Richelle  
Nereu, Michael  
Nichols, Aileen  
Paez, Juan  
Recinos, Valeria  
Ruiz, Linda  
Ostadsharif, Arman  
Saverio, Anjelika  
Scharff, James  
Schnee, Rebecca  
Shamroukh, Terri  
Sikorski, Janet  
Sims, Bonnie  
Singh, Savreet  
Smith, Spencer  
Torchia, Isabelle  
Utler, Hannah—  
Whalen, Emily  
Wille, Thomas