

BEFORE THE GOVERNING BOARD
OF THE
APPLE VALLEY UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force
Involving 169 Credentialed Employees of
the Apple Valley Unified School District,

Respondents.

OAH No. 2010030231

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Apple Valley, California, on April 8, 2010.

Margaret A. Chidester, Attorney at Law, and Alexandria M. Davidson, Attorney at Law, represented the Apple Valley Unified School District.

Carlos R. Perez, Attorney at Law, represented the certificated employees who appeared in this layoff proceeding.

The matter was submitted on April 8, 2010.

FACTUAL FINDINGS

The Apple Valley Unified School District

1. The Apple Valley Unified School District (AVUSD or the district) is located in Apple Valley, California. At an elevation of 3,000 feet, Apple Valley rests in the High Desert approximately 95 miles northeast of Los Angeles, 140 miles north of San Diego, and 185 miles south of Las Vegas. The community of Apple Valley comprises 78 square miles of incorporated area but has a sphere of influence of approximately 200 square miles.

AVUSD serves over 13,500 students in kindergarten through grade twelve. The district has nine elementary schools, three middle schools, two comprehensive high schools, one continuation high school and an alternative education center. Bus service is provided for students. As a result of the budgetary crisis, there will be a reorganization of the schools and an existing school site will be turned into district offices in the 2010-11 school year. The

district also operates nine pre-school programs on five sites, serving several hundred preschool students.

The district employs over 1,300 individuals, approximately 660 of whom provide certificated services. AVUSD's annual budget is approximately \$112 million, about 85 percent of which pays employee salaries and benefits.

2. The District is governed by an elected five-member Board of Education (the governing board). Robert Seevers (Superintendent Seevers), the Superintendent of Schools, is the Board's Chief Executive Officer. Thomas Hoegerman (Deputy Superintendent Hoegerman), who has been with the district for 20 years, is currently responsible for hiring certificated employees, initiating disciplinary actions, conducting negotiations with the teachers' association, and overseeing this layoff process. Ann Green (Director Green) is AVUSD's Director of Certificated Human Resources.

The Continuing Fiscal Crisis – Economic Layoffs

3. Proposition 13 limited the imposition of local property taxes and reduced a major source of assured revenue for funding public education in California. After Proposition 13 was passed, public school districts have looked primarily to the State of California and to other governmental entities for funding.

A school district cannot determine the level of state funding until the state budget is chaptered, an event usually occurring in July, but sometimes taking much longer. A school board's obligation to balance its budget often requires that some teachers, administrators or other certificated employees be given preliminary layoff notices, warning them that their services will not be required for the next school year. Under Education Code section 44949, these preliminary layoff notices must be given no later than March 15.

The economic layoff statutes found in the Education Code generally require the retention of senior employees over more junior employees and the retention of permanent employees over probationary employees and others with less seniority. A public school district may deviate from the general rule requiring termination in reverse order of seniority only if it can demonstrate that identifiable junior employees possess a credential, special training or experience necessary to teach a course of study or to provide services which more senior employees do not possess, a process known as skipping.

The District's Response

4. By early 2010, AVUSD's governing board and administration (as well as the governing boards and staff of most other public school districts) were aware of the State of California's continuing budget deficit and its probable crippling impact on public education. In addition, the district suffered declining enrollment in the 2009-10 school year. As a result of the impending financial crisis, AVUSD projected a budget deficit of about \$8.8 million for the 2010-2011 school year. The district was required to look into ways to balance its budget including the reorganization of the existing school sites (which included the closing of a

campus for academic purposes), increasing class size, and the reduction of certificated and classified staffing and the elimination of various programs.

Deputy Superintendent Hoegerman and AVUSD staff prepared a recommendation for Superintendent Seevers to present to the governing board which outlined the reduction and elimination of particular kinds of services being provided by certificated employees.

5. On February 18, 2010, under Education Code sections 44949 and 44955, Superintendent Seevers recommended to AVUSD's governing board that the district notify certain certificated employees that their services would not be required in the 2010-11 school year and the reason for the recommended reduction in force.

6. On February 18, 2010, the governing board passed the following amended resolution and exhibits:

“AMENDMENT to RESOLUTION #0910-24

**RESOLUTION OF THE GOVERNING BOARD OF THE
APPLE VALLEY UNIFIED SCHOOL DISTRICT
REGARDING A REDUCTION OR DISCONTINUANCE OF PARTICULAR KINDS OF
SERVICE**

WHEREAS, the District's Governing Board, upon recommendation of the Superintendent, has determined that it is in the best interests of the District, and the welfare of the students thereof, to reduce or discontinue certain particular kinds of services hereinafter enumerated.

NOW THEREFORE, IT IS HEREBY RESOLVED, DETERMINED AND ORDERED AS FOLLOWS:

1. Pursuant to Education Code §§ 44949 and 44955, the following particular kinds of service shall be reduced or discontinued at the close of the 2009-2010 school year. These services, listed by full-time equivalent (F.T.E) and part-time equivalent (P.T.E.) positions, and performed by certificated employees are as follows:

| | | | |
|-------|----------|---|--------------------|
| (1.1) | 75 | K-5 Elementary Classroom Teachers | (75 F.T.E.) |
| (1.2) | 1 | Middle School Instrumental Music Teacher | (1 F.T.E.) |
| (1.3) | 1 | Middle School Choral Music Teacher | (1 F.T.E.) |
| (1.4) | 4 | <i>Middle School Physical Education Teachers</i> | (4 F.T.E.) |
| (1.5) | 2 | Middle School Math Teachers | (2 F.T.E.) |
| (1.6) | 1 | Middle School Social Science Teachers | (1 F.T.E.) |
| (1.7) | 1 | Middle School English Teachers | (1 F.T.E.) |
| (1.8) | 2 | Middle School Science Teacher | (2 F.T.E.) |
| (1.9) | 2 | Middle School Art Teacher | (2 F.T.E.) |
| (2.0) | 1 | Middle School Computer Teacher | (1 F.T.E.) |
| (2.1) | 3 | High School English Teachers | (3 F.T.E.) |
| (2.2) | 3 | High School Math Teachers | (3 F.T.E.) |
| (2.3) | 1 | High School Choral Music Teacher | (1 F.T.E.) |
| (2.4) | 1 | High School Spanish Teacher | (1 F.T.E.) |
| (2.5) | 1 | High School Physical Education Teacher | (1 F.T.E.) |
| (2.6) | 1 | High School Art Teacher | (1 F.T.E.) |
| (2.7) | 13 | Special Education Mild/Moderate Teachers | (13 F.T.E.) |

| | | | |
|-------|------------|------------------------------------|--------------------|
| (2.8) | 8 | Counselors | (8 F.T.E.) |
| (2.9) | 2 | Elementary School Principals | (2 F.T.E.) |
| (3.0) | 1 | Middle School Principal | (1 F.T.E.) |
| (3.1) | 2 | Middle School Assistant Principals | (2 F.T.E.) |
| (3.2) | 2 | High School Assistant Principals | (2 F.T.E.) |
| (3.3) | <u>9</u> | Intervention Teachers | (9 P.T.E.) |
| | 137 | TOTAL | |

2. The Superintendent or his designee is hereby directed to serve notices of termination in accordance with and in the manner prescribed by Education Code §§ 44949 and 44955. In addition, the Superintendent or his designee is authorized, where deemed necessary, to issue additional notices so that certain other employees whose rights may be affected will have an opportunity to be heard.

3. In selecting those certificated employees who shall receive notice of termination pursuant to this resolution and the provisions of Education Code §44955, those certificated employees whose positions are set forth in Exhibit "A," a copy of which is attached hereto and by this reference incorporated herein, shall receive notice; however, an exception from the order of layoff will be sought because of the special training and experience of certain certificated employees who are assigned to teach a course of study or to fulfill a particular administrative task which others with more seniority do not possess.

4. The Governing Board has determined that as between certificated employees who first rendered service in a probationary position on the same date, the order of termination of said employees shall be determined by reference to the tiebreak criteria and points to be assigned as described in Exhibit "B," a copy of which is attached hereto and by this reference incorporated herein.

ADOPTED, SIGNED AND APPROVED THIS 18th DAY OF FEBRUARY, 2010

Robert E. Turner
Robert E. Turner
President, Governing Board

Exhibit "A" To Layoff Resolution #0910-24

**CERTIFICATED PERMANENT, PROBATIONARY AND TEMPORARY PERSONNEL WHOM
THE DISTRICT SHALL SEEK TO EXEMPT FROM THE ORDER OF LAYOFF BY VIRTUE
OF THEIR CREDENTIALS, COMPETENCE, ASSIGNMENT, EXPERIENCE OR
CERTIFICATION**

The Governing Board will seek to exempt from the order of certificated layoff, pursuant to Education Code § 44955 because of special training, experience, or credential that others with more seniority do not possess:

1. Certificated personnel who possess an *administrative credential*, who are currently assigned to administrative positions, and who will be assigned to administrative positions for the 2010-2011 school year.
2. Certificated personnel who possess a credential authorizing service in *language, speech and hearing*, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2010-2011 school year.

3. Certificated personnel who possess ***a waiver authorizing service in the area of language, speech and hearing***, who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2010-2011 school year.
4. Certificated personnel who are presently assigned as a Teacher on Assignment, and who will be assigned in that position for the 2010-2011 school year.
5. ***Certificated personnel who possess a credential authorizing service in Bilingual, Crosscultural, Language and Academic Development (BCLAD), who are presently assigned within the scope of that credential, and who will be assigned within the scope of that credential for the 2010-2011 school year.***

Exhibit “B” To Layoff Resolution #0910-24

TIEBREAKER CRITERIA AND POINT SYSTEM TO BE APPLIED WHEN CERTIFICATED PERMANENT AND PROBATIONARY PERSONNEL SHARE THE SAME FIRST DATE OF PAID SERVICE

The District values the services of all employees who may, by coincidence, share the same date of first paid service in a probationary position. Education Code section 44955(b) states in part:

“As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof.”

1. The Governing Board has determined that as between certificated employees who first rendered service in a probationary position to the District on the same date, the order of termination of said employees shall be determined by reference to the tiebreaker criteria and points to be assigned as follows:

A. Seniority shall be determined according to the first day of work performed in probationary status.

B. Unit members with the same first day of work performed in probationary status shall have their seniority order determined by lot.

1. The lottery shall be conducted in the presence of at least two (2) Association representatives.

2. Seniority determined by lot shall remain effective while the unit member is employed in the District.

C. Criteria for Resolving Ties in Seniority Related to Certificated Layoffs

1. Whereas Education Code section 44955, subsection (b), related to certificated layoffs, provides, in relevant part, that “between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof...”

2. Based upon the needs of the District and the students thereof, the following criteria shall be applied in order, one step at a time, to resolve ties in seniority between certificated employees as outlined in the contract agreement between Apple Valley Unified School District and Apple Valley Unified Teachers' Association.

- a. First day of full time teaching service in the district as a bargaining unit member.
- b. Authorization to teach English Language Learners (CLAD, BCLAD, SDAIE, SB395, etc.).
- c. Number of years credentialed teaching experience in the District (prior to seniority date).
- d. Number of years credentialed teaching experience outside the District.
- e. Teaching experience in different grades or subjects.
- f. Number of additional credentials or supplemental authorizations.
- g. Possession of a Masters Degree - earliest date prevails.
- h. Possession of a Doctorate Degree - earliest date prevails.

2. Individuals who are specifically exempted by resolution and individuals who do not receive a notice of layoff due to the scope of their credential will be properly credited in the event of a dispute.

3. Employees who receive a notice and who share the same date of first paid service shall be ranked by the criteria set by the AVUTA contract.

4. If the criteria listed above does not break a tie, the District shall hold a lottery at least five work days prior to the layoff hearing. Each group of tied employees shall have the right to attend the lottery and pick a lottery number. In the absence of the employee, the Superintendent or designee will select a lottery number on behalf of the employee.

5. As between tied employees, low lottery numbers will indicate low seniority for that hire date.

6. These criteria have been determined to best serve the needs of the District and students thereof, and will be applied in the *April, 2010* layoff hearing in which the issue may arise."

Jurisdictional Matters

7. On and before March 15, 2010, 169 certificated employees of AVUSD were served with written notice that the Superintendent of Schools had recommended that their services be terminated at the conclusion of the current school year, and that their services would not be needed for the upcoming 2010-11 school year. Each employee was notified of the right to a hearing. Each employee who filed a request for a hearing was thereafter served with an accusation and other required jurisdictional documents.

8. On April 8, 2010, the record in the administrative hearing was opened. Jurisdictional documents were presented. An amendment to the amended resolution was proposed, which was accepted without objection. The amendment made the following changes to the amended resolution:

(1.1) 75 K-5 Elementary Classroom Teachers (the proposed reduction of 75 F.T.E. was reduced to 68 F.T.E.)

(2.7) 13 Special Education Mild/Moderate Teachers (the proposed reduction of 13 F.T.E. was reduced to 10 F.T.E.)

(2.9) 2 Elementary School Principals (the proposed reduction 2 F.T.E. was reduced to 1 F.T.E.)

(3.1) 2 Middle School Assistant Principals (the proposed reduction of 2 F.T.E. was eliminated.)

(3.2) 2 High School Assistant Principals (the proposed reduction of 2 F.T.E. was eliminated.)

Thereafter, stipulations were reached regarding the admissibility of the district's documentary evidence, sworn testimony was given, documentary evidence was received, and the parties agreed that that the layoff notice served upon respondent Janet Ambie (employee number 248) be rescinded and that the accusation filed against her be dismissed. Thereafter, closing arguments were given, the record was closed, and the matter was submitted.

The Particular Kinds of Services

9. The services identified in the governing board's resolution were services the governing board could properly reduce and discontinue. The reduction of those services was neither arbitrary nor capricious, and the reduction of services was a matter within the board's discretion. No particular kinds of services were lowered to levels below those levels mandated by state or federal law. The district's administrative staff considered all known positive attrition including resignations, retirements, military service obligations, and probationary non-reelects to determine the number of layoff notices that needed to be issued.

The Seniority List

10. AVUSD maintained a seniority list, a living document that is constantly updated as new employees are hired, when other employees retire or resign, and when new information concerning an employee's credential status or other information is brought to the district's attention. An employee's seniority date set forth in the seniority list is based on the employee's first date of paid service with the district in a probationary position.¹

¹ Education Code section 44845 provides:

Before issuing preliminary layoff notices, AVUSD provided employees with an opportunity to review the seniority list and to advise of any need to make changes to it. Changes were brought to the district's attention and the seniority list was updated to reflect those changes until the day before this layoff proceeding.² There is one job share position within the district, but the least senior of the two employees who participated in that job share had sufficient seniority that the position was not impacted by the layoff proceeding.

11. Under Deputy Superintendent Hoegerman and Director Green's supervision, a final seniority list, a bumping list based on that seniority list, several schedules with the names of all persons who would not be with the district the following year as a result of attrition, and the results of lotteries for employees hired on the same dates were prepared.

12. According to Deputy Superintendent Hoegerman, the district made assignments based on an employee's seniority and the employee holding of an appropriate credential. Under the board's resolution, certain employees were "exempt" from the layoff process. Those employees who were skipped included: certificated personnel who possessed an administrative credential who were currently assigned to administrative positions and who would be assigned to administrative positions for the 2010-2011 school year; certificated personnel who possessed a credential authorizing service in language, speech and hearing or a waiver authorizing service in the area of language, speech and hearing who were presently assigned within the scope of that credential and who would be assigned within the scope of that credential for the 2010-2011 school year; certificated personnel who were presently assigned as a Teacher on Assignment³ and who would be assigned in that position for the 2010-2011 school year; and certificated personnel who possessed a BCLAD authorization who were presently assigned within the scope of that credential and who would be assigned within the scope of that credential for the 2010-2011 school year.

According to Deputy Superintendent Hoegerman, the individuals who were skipped held appropriate credentials and possessed distinct experience that made their services particularly valuable to the district such that the retention of these properly credentialed and uniquely qualified employees was in the best interest of the district and the students thereof, even though the retention of some of these employees might impact the continuing employment of more senior employees who did not possess such credentials or qualifications. It was not established that the district's exemption of these individuals was not in good faith, or that arbitrary criteria were used to skip these junior employees, or that the skipping of these persons was not in the best interest of the district or its students.

"Every probationary or permanent employee employed after June 30, 1947, shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."

² The use of the tie-breaking criteria and the criticism of the manner in which the tie-breaking criteria were applied are separately discussed hereafter.

³ Employees assigned as Teachers on Assignment (TOA), sometimes known in other districts as Teachers on Special Assignment (TOSA) have special training, skills and acquired knowledge. In the AVUSD, TOAs mentor other teachers, provide in-service training, and are responsible for acquiring grants and other funding.

13. Although no temporary employees or substitute teachers were involved in this layoff proceeding, precautionary notices were sent to temporary employees.

Core Assignments

14. Most elementary schools, regardless of the grade level configuration, are organized around a self-contained classroom where most or all subjects are taught to the same group of children by a single teacher. Most elementary school teachers hold a Ryan Multiple Subject Teaching Credential, which permits an individual to teach multiple subjects to students in a self-contained classroom.

Most high schools have departmentalized classes. Most high school teachers hold a single subject teaching credential. With a single subject teaching credential, a teacher may teach any class within the broad single subject area listed on the credentialing document.

Middle schools and junior high schools⁴ provide a transition from the elementary school's self-contained classroom to the departmentalized programs offered in high schools. As a result, middle schools and junior high schools may incorporate features not generally present at the elementary school or high school levels, and some authorizations to teach middle school are unique.

If a middle or junior high school program is arranged so that one teacher provides instruction in several subjects, it is a self-contained classroom and that middle school or junior high school teacher must have a multiple subject credential. But, when a middle school or a junior high school teacher teaches just one subject to several groups of students, he or she needs to have a credential that authorizes the teaching of that subject in a departmentalized setting.

Within the middle school and junior high school milieu, a "core assignment"⁵ involves a middle school or junior high school teacher providing instruction in a self-contained classroom where he or she teaches two or more subjects for two or more periods per day to the same group of pupils, and, in addition, teaches any of those subjects to a separate group of pupils at the same grade level for an additional period or periods, provided that the additional period or periods do not exceed one-half of the teacher's total assignment.

15. Based on her extensive training and many years of experience as an administrator, Director Green established that she was extremely familiar with the kinds of credentials and authorizations that were required to teach in various subject matter areas and that she was knowledgeable about what constituted a core assignment. Director Green carefully examined the credentials of each employee impacted by the layoff proceeding to determine if that employee was authorized to teach a core assignment, whether a senior teacher could become

⁴ Middle schools are defined as schools that most frequently include grades six through eight but may have any combination of grades five through eight. Junior high schools often also include grade nine.

⁵ A core assignment is defined in Education Code section 44258.1.

qualified by reason of the teacher's education and training to teach a core assignment, and whether a displaced core assignment teacher had the seniority and competence to bump into a position held by a more junior teacher at either the elementary school or at the high school level including teaching exclusively in grade nine. Director Green continued her examination and counsel until the day before the layoff proceeding, and her efforts were reflected in the bumping list. There was no evidence that any of her judgments concerning seniority and credentials related to core assignments were incorrect, and there was no evidence that Director's Green's judgment concerning credential qualifications in other areas was incorrect.

The Tie-Breaking Procedure

16. AVUSD's tie-breaking procedure is unique. AVUSD's procedure is based upon Article 6 of the collective bargaining agreement between AVUSD and the Apple Valley Unified Teachers' Association (the teachers' association) and the interpretation that has been given to that agreement by the district and the teachers' association for the past three years.

Section A of the agreement provides: "Seniority shall be determined according to the first day of work performed in a probationary position."

Section B of the agreement provides:

"Unit members with the same first day of work performed in probationary status shall have their seniority order determined by lot.

1. The lottery shall be conducted in the presence of at least two (2) Association representatives.
2. Seniority determined by lot shall remain effective while the unit member is employed by the District."

Section C of the article provides in part:

"Based upon the needs of the District and the students thereof, the following criteria shall be applied in order, one step at a time, to resolve ties in seniority between certificated employees:

- a. First day of full time teaching service in the district as a bargaining unit member.
- b. Authorization to teach English Language Learners (CLAD, BCLAD, SDAIE, SB395, etc.).
- c. Number of years credentialed teaching experience in the District (prior to seniority date).
- d. Number of years credentialed teaching experience outside the District.

- e. Teaching experience in different grades or subjects.
- f. Number of additional credentials or supplemental authorizations.
- g. Possession of a Masters Degree - earliest date prevails.
- h. Possession of a Doctorate Degree - earliest date prevails.”

17. Deputy Superintendent Hoegerman testified that when the district determines it is necessary to break a tie between employees who possess the same first paid date of probationary service, the district contacts the teachers’ association. In the presence of representatives from the teacher’s association, the district applies the Article 6, Section C criteria as they existed on the employees’ first date of paid service. The criteria are applied step by step, and the employees who possess the criteria that others in their class do not are given senior status. When all remaining members in the class do not meet a common criteria (for example, at step “c” no employee with the same date of hire has any teaching experience in the district before his or her seniority date), a tie is declared and a lottery is conducted for all of those employees. The additional criteria below step “c” (number of years credentialed teaching experience outside the District, teaching experience in different grades or subjects, number of additional credentials or supplemental authorizations, possession of a m masters degree, possession of a doctorate Degree) are not considered even though an employee who is in a tied status may possess one or more of those criteria. At that point, a lottery is conducted by teacher association representatives in which the seniority of the teachers who are tied is determined. The lottery results are provided to the district.

If an employee who was in a tie later establishes that he or she held a particular authorization, credential or degree, or possessed relevant experience on that employee’s first day of work performed in a probationary status, then that employee is credited with meeting the tie-breaking criteria and is given seniority over those in the tie who did not possess that criteria; a new lottery is then conducted.

If an employee obtains a credential or degree or attains additional experience after the employee’s first day of work performed in a probationary status, the employee’s acquisition of that criterion does not change the employee’s seniority status under the agreed tie-breaking criteria because that criterion was not possessed on the employee’s first day of work.

Deputy Superintendent Hoegerman testified that the district has utilized the aforementioned tie-breaking criteria in the manner described for several years and did so with the assistance of representatives from the teachers’ association.

No document or testimony was provided to establish that any teacher or any teachers’ association representative disagreed with the district’s application of the tie-breaking criteria before the day of the hearing, although argument was made that there was criticism of the tie-breaking procedure in at least two previous layoff proceedings.

18. Pamela Hammond (Hammond), a teacher, testified that she was hired the same date as 30 other teachers, but unlike many of those teachers, she had a master's degree and had significant teaching experience in other school districts before her employment with AVUSD. She complained that AVUSD's application of the tie-breaking criteria did not take this advanced degree and experience into consideration, and that as a result of the lottery, she was given seniority position 26 of the 31 teachers hired on the same date. The employees in a tie who were given the first and second seniority positions based upon the lottery had no advanced degree and had no teaching experience at all before their employment with the AVUSD. Based upon this, Hammond wondered how it could be concluded that the application of the tie-breaking criteria was in the best interest of AVUSD or its students.

19. Stephanie White (White), a middle school physical education teacher hired in 2004, expressed similar concerns to those expressed by Hammond. White, like Hammond, held a master's degree and had considerable teaching experience before she was hired by AVUSD. She, too, wondered how the application of the tie-breaking criteria benefitted the district and its students.

20. Erica Luke (Luke), who was hired in August 2007, held the same seniority date as 15 others. Her position was listed as "temp" on the seniority list even though she had previously held tenured status. Luke was concerned about the application of the tie-breaking procedure, as was Hammond and White, because Luke had ten years of teaching experience outside the district before she was hired.

Green established that Luke's employment was subject to termination following the 2009 layoff proceeding, but that Green was able to find a temporary position for Luke in a categorically funded assignment. Luke signed a "temporary" contract for this assignment, which was the reason the word "temp" was listed adjacent to Luke's name on the seniority list. However, Green established that the district did not consider Luke to be a temporary teacher for seniority purposes and that Luke's employment status was not negatively impacted by the fact that she had been working in a temporary assignment. Luke did not have sufficient seniority and competence (in terms of holding an appropriate credential) to bump a more senior employee and was thus subject to layoff in this proceeding.

21. The district represented that even if the tie-breaking criteria were improperly applied, which it did not concede, such an error would be irrelevant since all persons who were subject to the purported misapplication would be subject to layoff in any event; in other words, there would be no prejudice.

22. Although there was heavy criticism of the district's application of the tie-breaking criteria and the assertion that the teachers' association had no role in the district's interpretation and application of the criteria, no testimony or documentary evidence controverted District Superintendent Hoegerman's testimony to the contrary or refuted all of the inferences reasonably drawn from such testimony. No seniority list was proposed that set forth the "correct" manner in which to assign seniority. No employee testified that the misapplication of the tie-breaking criteria as applied should specifically result in that teacher being able to bump another teacher by reason of seniority.

The Layoff Procedure

23. AVUSD's governing board resolved to reduce and discontinue particular kinds of services provided by teachers and other certificated employees for budgetary reasons. This decision was not related to the competency or dedication of the employees whose services were proposed to be discontinued. The governing board's determination that certain employees were exempt from the layoff was lawful, reasonable, and in the best interest of the district and its students.

The district's administrative staff initiated and followed a systematic procedure for identifying employees directly affected by the governing board's resolution. Careful evaluation of each employee's seniority date, credential, and qualifications preceded the determination of what bumping rights, if any, an employee had. Adjustments were made to the seniority list where indicated until the day before the layoff proceeding.

Except for employees who were exempted from the process, no junior credentialed employee was retained by the district to provide services which a more senior employee was certificated, competent and qualified to render.

Teacher Testimony

24. The heartfelt testimony of the teachers who testified raised questions about the application of the tie-breaking process. The testimony reflected the witnesses' love of teaching, their desire to retain their employment, and their concern about what was in the best interest of the district and its students. Their testimony established the frustration, sorrow and inevitable loss that accompany the termination of bright, young, highly skilled, enthusiastic teachers. The teachers' testimony did not establish that any mistakes were made in the assessment of seniority and competency related to a teacher's credential.

LEGAL CONCLUSIONS

Statutory Authority

1. Education Code section 44944 provides in part:

“No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year . . . the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor . . .

- (b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year . . . If an employee fails to request a

hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with . . . the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

. . .

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. . . .”

2. Education Code section 44955 provides in part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary . . . to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

. . .

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof . . .

. . .

(c) Notice of such termination of services shall be given before the 15th of May . . . and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(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. . . .”

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondent employees who were identified in the accusation.

The Reduction of Particular Kinds of Services

4. A school board's decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. Where a governing board determines to

discontinue or reduce a particular kind of service, it is within the discretion of the board to determine the amount by which it will reduce a particular kind of service as long as a district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

Competence

5. The intent of the Education Code is to leave to a school board the discretion of determining whether in addition to possessing seniority an employee is also “certificated and competent” to be employed in a vacant position. The term “competent” in this regard relates to an individual’s specific skills or qualifications including academic background, training, credentials, and experience, but does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.) In addition to seniority, the only limitation in placing a teacher in a vacant position is that the teacher selected be “certificated and competent” to render the service required by the vacant position. Among employees who meet this threshold limitation, there is no room in the statutory scheme for comparative evaluation. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299.) An employee holding a special credential or needed skill, if such credentials or competence are not shared by a more senior employee, may be retained though it results in termination of a senior employee. (*Moreland Teachers Assn. v. Kurze* (1980) 109 Cal.App.3d 648, 655.)

Seniority, Bumping, and Skipping

The Statutory Scheme

6. Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part, as follows: “Except as otherwise provided 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.” Essentially this language provides “bumping” rights for senior certificated and competent employees, and “skipping” authority to retain junior employees who are certificated and competent to render services which more senior employees are not. Subdivision (d)(1) of section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 134-135.)

Skipping

7. Subdivision (d)(1) of section 44955 expressly allows a district to demonstrate its specific “needs” and there is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at 138.)

Bumping

8. The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at 136-137.)

Tie-Breaking

9. Education Code section 44955, subdivision (b) provides in part:

“As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.”

10. Respondents argued that the application of district’s tie-breaking procedure was improper, that the tie-breaking procedure should have included consideration of all criteria on the tie-breaking list before a lottery was conducted, that the tie-breaking procedure did not take into account newly acquired credentials, degrees and experience, that the entire layoff process was tainted by these and other errors, and that the proper remedy for these egregious violations was “to throw out the entire proceeding.”

The district argued that there was no error in the application of the tie-breaking criteria, but if so, then no actual injury was established as a result.

11. Education Code section 44944, subdivision (c)(3) provides in part:

“Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors.”

12. With regard to the application of tie-breaking criteria, an employee must establish prejudice. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at 144.)

13. Even if error existed, invalidation of the entire layoff procedure as suggested by respondents would constitute an inappropriate remedy. On this record, any tie-breaking error was a nonsubstantive procedural error that did not result in prejudice and does not invalidate the layoff proceeding. This conclusion does not preclude the district and the

association from revisiting and amending the tie-breaking process for purposes of rehire following this layoff proceeding and the use of a different system in future proceedings.

Cause Exists to Give Notice to Certain Employees

14. As a result of the governing board's lawful reduction and elimination of particular kinds of service, cause exists under the Education Code for the district to give notice to those respondents identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2010-11 school year.

Determination

15. The charges set forth in the accusation were sustained by the preponderance of the evidence and were related to the welfare of the Apple Valley Unified School District and the pupils thereof. AVUSD's administrative staff made necessary assignments and reassignments in such a manner that the most senior employees were retained to render services which their seniority and qualifications entitled them to render, except as otherwise noted herein. Unless exempted by board resolution, no employee with less seniority than any respondent will be retained to render a service which any respondent identified hereafter is certificated, competent and qualified to render.

This determination is based on all factual findings and on all legal conclusions.

RECOMMENDATION

It is recommended that the governing board give final notice to the respondents whose names are set forth below that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2010-2011 school year.

Joshua McClane; Heather Fieler; Matthew Stiglich; Linda Shelton; Tracie Bennett; Kimberly Davis; Carrie Mondt; Luis Calderon; Susan Bennis; Brett Mondt; Kristy Croft; Brock Barrington; Jennifer Ulrich; Daniel Casady; Laura Rice; Karen Sabers; Barbara McNelis; Suzanne Smith; Victoria Reynolds, Jeniffer Manning; Philip Maglinte; Carmen Ponce de Leon; Aimee Kurtz; Violet Carter; Rane Daudel; Shaun Ricker; Jessica Vargas; Vicky McDaniel; Melissa Bonneau; Melanie Moniz; Carol Olin; Tammy Scott; Megan Ross; Kristen Cabrera; Kerry Sapina; Wendy Bastianon; Adele Turner-McClain; Alicia Brown; Karen Rampley; Deanne Jennison; Martha Lopez; Kristin Dupree; Shana Gauger; Grant Pederson; Amy Reed; Nicole Steely; Sarah Grief; Kristine Robsahm; Kris Von Kaenel; Ryan Ostlie; Sandra Waller; Megan Lukehart; Guadalupe Del Real; Bridgitt Williams; Courtney O'Hara-Tsai; Kate Swick; Pamela Hammond; Georgina Barreda; Shannon O'Reilly; Holly Silvering; Laura Stewart; Esther Haskins; Sean Sooter; Olivia Allala; Oliver Hutfilter; Carrie Talataina; Cheryl Denny; Nichole Catanesio; Martell Olson; Debra Boyd; Angelica Munoz; Christopher Tyler; Cynthia Breves; Kittie Yonamine; Kyle Nettels; Erica Luke; Kenneth Cooper; Amber Vu; Melanie Thomson; Bramlett Browne; Casey Kemble; Robin Fowlie;

Kyle Godfrey; Sherri Szabo; Louise Herington; Sean Sers; Wendy Thielen; David Luther; Jarom Viehweg; Justin Price; John Parker; Melissa Matthews; Lourdes Anderson; Vicki Angel; Golden Coates; Sara McCombie; Efrain Estrada; Erik Crull; Anthony Bonato; Emily Gollmyer; Julie Martinez; Kimberly Connolly; Inga Swearingen; Deniss De La Rosa; Tiina Collier; John Britt; Audrey Hovannesian; John Boyd; Eric Olson; Madhu Melvani; Karen Silz; Cynthia Bien; Jonathan Cahow; Julia Valadez; Kristen Celie; Lindi Hobbs; Paula Lohmann; and Meera Hupp.

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings