

BEFORE THE
GOVERNING BOARD OF THE
DELHI UNIFIED SCHOOL DISTRICT
COUNTY OF MERCED, STATE OF CALIFORNIA

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

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE DELHI UNIFIED
SCHOOL DISTRICT,¹

Respondents,

OAH No. 2017031127

PROPOSED DECISION

This matter was heard before Administrative Law Judge John DeCure, Office of Administrative Hearings, State of California, on April 24, 2017, in Delhi, California.

Delhi Unified School District was represented by Todd Goluba, Attorney at Law.

Respondent Karna Pacheco (respondent Pacheco) was represented by Joshua Richtel, Attorney at Law.

No other respondents (respondents) appeared.

Testimony and documentary evidence were received, and oral closing arguments were made. The record was closed, and the matter was submitted for decision on April 24, 2017.

FACTUAL FINDINGS

Jurisdiction

1. Adolfo Melara is the Superintendent of the Delhi Unified School District (District). The actions of Superintendent Melara, and those of the District's staff and Governing Board (Board), were taken solely in their official capacities.

¹ See Attachment A.

2. On February 2, 2017, Superintendent Melara recommended that the Board reduce or discontinue particular kinds of services (PKS) no later than the beginning of the 2017-2018 school year in the amount of 17.0 full-time equivalent (FTE) positions. The Board adopted Resolution No. 2-2-2017-C, entitled “(Amended) Resolution of the Governing Board of the Delhi Unified School District Regarding the Reduction or Discontinuance of Particular Kinds of Service (Certificated Layoff)” (Amended Resolution), which provides that it was necessary to reduce or discontinue PKS in the amount of 17.0 FTE positions.

3. The Board further determined that it was necessary by reason of the reduction or discontinuance of services to decrease the number of certificated employees at the close of the 2016-2017 school year by a corresponding number of FTE positions. The Board directed Superintendent Melara or his designee to send appropriate notices to all employees whose services would be terminated as a result of the Board’s action to reduce or discontinue PKS.

4. On February 8, 2017, Superintendent Melara served respondents and respondent Pacheco with written notice, entitled “Notice of Recommendation that Services Will Not Be Required” (Notice), pursuant to Education Code sections 44949 and 44955, of his recommendation to the Board that respondents’ services be terminated at the close of the 2016-2017 school year. A copy of the Amended Resolution was served with the Notice.

5. All respondents were properly and timely served with the Notice and timely requested a hearing to determine if there is cause for not reemploying them for the 2017-2018 school year.

6. All respondents were properly and timely served with the District’s Reduction in Force packet, which contained a Cover Memo, Statement to Respondent, Statement of Reduction in Force, Notice of Hearing, Notice of Participation, Request for Discovery and applicable statutes, and was signed by Superintendent Melara on April 3, 2017. Respondents and respondent Pacheco timely filed notices of participation.

7. All respondents are certificated permanent employees of the District. Respondent Pacheco is a first grade, Spanish-English bilingual “dual immersion” teacher at Harmony Elementary School (Harmony) within the District.

8. Jurisdiction for the subject proceedings exists pursuant to Education Code sections 44949 and 44955. As to non-appearing respondents, this case proceeded by way of default under Government Code section 11520.

Case Summary

9. As to respondents other than respondent Pacheco, the District presented evidence to establish that the reduction or discontinuation of the PKS set forth in its Amended Resolution are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955, and that the decision to reduce or

discontinue these services is neither arbitrary nor capricious, but rather a proper exercise of discretion of the District. This evidence was not contested, as no respondents, other than respondent Pacheco, appeared.

10. The issue contested at hearing was whether respondent Pacheco was properly subject to layoff. The District followed a tiebreaking procedure involving a comparison of the yearly salaries of respondent Pacheco and two other teachers. As a result of that procedure, the District determined that of the three teachers potentially subject to layoff, respondent Pacheco had the lowest yearly salary and was therefore subject to layoff. Respondent Pacheco contended the District incorrectly determined her salary as lower than the other teachers, when in fact respondent Pacheco's salary was identical to the other teachers' salaries. The evidence supported respondent Pacheco's contention.

Services to be Reduced or Discontinued

11. The Amended Resolution authorized Superintendent Melara to take action to reduce or discontinue the following PKS for the 2017-2018 school year:

	<u>Services</u>	<u>FTE</u>
a.	Elementary School Teaching Services	8.0
b.	High School Teaching Services	2.0
c.	Alternative Education Teaching Services	2.0
d.	Categorically Funded Teaching Services (Teacher on Special Assignment – Instructional Coach)	5.0
Total Full-Time Equivalent Reduction		17.0

12. In determining the extent by which to reduce or discontinue PKS, the District's Board considered all positively assured attrition, including all deaths, resignations, retirements, non-reelections, and other permanent vacancies for 2017-2018 up to and including the date of the Amended Resolution. The total number of positions to be reduced or discontinued under this resolution is 17.0 FTE certificated positions. The Board determined that the services of a corresponding number of certificated employees shall be terminated at the close of the current 2016-2017 school year.

13. Respondent Pacheco's services as a teacher for the District fall under the category of Teacher on Special Assignment - Instructional Coach.

Cause for Reduction or Discontinuance of Services

14. The services set forth in the Amended Resolution are “particular kinds of services” that may be reduced or discontinued within the meaning of section 44955. The Amended Resolution does not reduce services below the mandated levels. There was no evidence that the Board’s decision to reduce or discontinue the identified services was arbitrary or capricious. The reduction or elimination of the services set forth in the Amended Resolution constituted a proper exercise of the Board’s discretion, within the meaning of section 44955.

District’s Criteria to Resolve Ties in Seniority between Certificated Employees

15. Education Code section 44955 provides that the services of no permanent employee may be terminated while any probationary or other employee with less seniority is retained to render a service which the permanent employee is certificated and competent to render.

16. In the Amended Resolution, the Board established criteria to resolve ties in seniority between certificated employees. These criteria are listed below in priority order, and each criterion shall be used only if the preceding criteria do not determine the order of termination:

- a. Possession of a currently valid and properly filed regular credential (clear, professional clear, or preliminary).
- b. Possession of a currently valid and properly filed BCLAD, BASP, CLAD, EL, SDAIE, or other valid certificate authorizing instruction to English Language Learners.
- c. The certificated employee meets the certification and licensing requirements of the ESSA.
- d. The certificated employee whose currently valid and properly filed credentials authorize a broader scope of service. (This tie-breaker is to be repeated as applicable.)
- e. The certificated employee holding the highest current placement on the salary schedule. (This tie-breaker is to be repeated as applicable.)
- f. If a tie still exists after application of criteria a. to e., 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.

17. In the Amended Resolution, the Board established a deadline for employees to submit relevant documentation, stating:

That employees must have filed documents with the Human Resources Office by February 1, 2017 evidencing credentials, certifications, authorizations, degrees or other requirements in order to be considered for the purpose of determining seniority placement, order of layoff, and competency in this proceeding.

18. In determining which teachers acting as Instructional Coaches would be subject to layoff, the District compared respondent Pacheco's seniority with the seniority of two other teachers assigned as Instructional Coaches, Anet Fuentes and Norica Naranjo. The District applied the first four tiebreaking criteria (a. through d.) set forth above to determine seniority, none of which resulted in a determination of the proper order of termination. The District then applied the fifth tiebreaking criteria (e.) of determining the certificated employee holding the highest current placement on the salary schedule. The District determined that Ms. Fuentes and Ms. Naranjo both currently earned salaries of \$54,788 per year. The District determined that respondent Pacheco earned \$53,238. Because respondent Pacheco earned the lowest salary among the three teachers, the District determined that she was subject to layoff.

19. The District did not issue a Notice of Participation in the hearing to Ms. Naranjo because it previously determined she was not subject to layoff.

20. The District did not address Ms. Fuentes's status in its reduction-in-force process at the hearing. However, attorney Richtel, who also represents Ms. Fuentes, stated that Ms. Fuentes was not present at the hearing because her rights and interests were not affected by the proceedings. The District's lawyer, Mr. Goluba, concurred with Mr. Richtel. Respondent Pacheco and the District indicated that the only contested issue at hearing was whether respondent Pacheco was properly subject to layoff due to the tiebreaking procedure the District employed as to yearly salary.

21. The evidence established that when the District applied the criteria of determining which of the three employees held the highest current placement on the salary schedule, it relied upon a current salary for respondent Pacheco that was incorrect. More specifically, prior to the 2016-2017 school year, the District failed to increase respondent Pacheco's yearly salary from her current salary category to the next higher category after she had earned enough educational credits to qualify for the next higher category. The relevant details are as follows.

22. The District's 2016-2017 Certificated Salary Schedule provides for 25 stepped pay increases as applied to four salary categories. Each salary category is determined by the teacher holding a bachelor in arts degree (BA) in addition to a minimum number of educational course-credits (credits) related to teaching and higher education. To qualify for category I pay, a teacher must have a BA and 30 credits; for category II pay, a teacher must

possess a BA and 45 credits; for category III pay, a teacher must possess a BA and 50 credits; and for category IV, a teacher must possess a BA and 75 credits.

23. The evidence established that respondent Pacheco qualified for a category II yearly salary months prior to the District's issuance of its Amended Resolution. On August 26, 2016, respondent Pacheco submitted a Delhi Unified School District Request for Approval of Units form (Approval of Units form) describing two educational courses, "EDUX 5730 Two Way Bilingual," offered by Vanguard University, and "PDSI 9434 Harnessing the Power of Teachers," offered by University of the Pacific. Respondent Pacheco checked a box indicating that the type of course-study was "Conference for which units are granted." Respondent Pacheco checked a box indicating that the request was part of her "professional growth plan." She checked another box indicating this was not a course required for her credential, and explained, in a subsequent portion of the form, that "Bilingual program further academic success and development as to promote benefits for all students to engage." Respondent Pacheco had already completed both courses, earning seven credits, before August 2016, and before she submitted the Approval of Units form to Harmony's principal for his approval. Harmony's principal approved and signed the Approval of Units form on August 25, 2016, and it was immediately forwarded to the District.

24. Sharon Limpel, the District's Director of Human Resources, testified that the Approval of Units form respondent Pacheco submitted contained errors, in that the form is designed to be used for one course only. In other words, respondent Pacheco should have submitted two forms, one for each course she completed. The District also prefers that teachers submit these forms before they enroll in, and complete, the course, not after they complete the course, as respondent Pacheco did. Also, the word "Term" appears beneath one blank line of respondent Pacheco's Approval of Units form, indicating the time frame in which the course was to be taken and completed. However, respondent Pacheco did not indicate the term for the two courses she listed. Because no terms were stated, the District could not obtain transcripts to verify respondent Pacheco had completed the courses, because it did not know when respondent Pacheco would take the courses. As a result, the Approval of Units form was placed in an inactive file for forms awaiting approval and no further action was taken.

25. The District does not provide training to its teachers regarding how to properly fill out Approval of Units forms. Respondent Pacheco had to rely upon informal word of mouth from other teachers at Harmony regarding how to fill out her form.

26. Shortly after respondent Pacheco received the Superintendent's Notice in February 2017, she visited the District's Human Resources Department in order to obtain specific information about her salary status, so that she would have sufficient knowledge to negotiate her salary when she sought new employment with other school districts. The Human Resources Department reviewed respondent Pacheco's documentation and retrieved respondent Pacheco's Approval of Units form, which was still located in the same inactive file where it had been placed in August 2016. Upon further review, the District noted that

respondent Pacheco had already provided the District with the transcripts verifying that she had completed both courses reflected on the Approval of Units form. The transcripts showed respondent Pacheco had completed these courses, earning seven credits, before August 2016, when she had submitted the Approval of Units form to her principal, and the District, for approval.

27. Because the additional seven credits qualified respondent Pacheco as possessing a BA and 45 credits, the District immediately increased respondent Pacheco's salary from category I to category II, effectively increasing her pay to \$54,788 per year. The District also made the pay increase retroactive to August 2016, when respondent Pacheco submitted the Approval of Units form, because the transcripts showed she was qualified for the higher category II salary in August 2016.

28. Respondent Pacheco's category II salary is equal to Ms. Fuentes's and Ms. Naranjo's yearly salaries, thus invalidating the tiebreaker the District relied upon in determining respondent Pacheco was subject to layoff. Because the District did not involve the other two teachers in the hearing, the District could not implement further tiebreaker criteria.

Further Contentions

29. The District argued that it should be allowed to rely on the information it gathered prior to the issuance of the Amended Resolution as accurate, and therefore, respondent Pacheco should still be subject to layoff. This contention was unpersuasive. Ms. Limpel candidly admitted that because the District possessed the Approval of Units form as well as the transcripts for the two courses respondent Pacheco completed, it had all the information it needed to approve her request for additional course credits. But that information was in two places, and the District did not make the connection.

30. The problem here did not lie in the timely receipt of information relevant to the District's layoff process. The District had set a February 1, 2017 deadline for its teachers to submit relevant documentation evidencing credentials, certifications, authorizations, degrees or other requirements in order to be considered for the purpose of determining seniority placement, order of layoff, and so on. A reasonable presumption may be made that by imposing this deadline, the District was attempting to gather as much relevant information as was available prior to making any layoff determinations. This was a commendable purpose. Yet, respondent Pacheco complied with this directive, submitting relevant documentation directly affecting her salary, and she did so more than five months prior to the District's deadline.

31. The District's reliance on the inaccurate salary information it had regarding respondent was due to its months of inaction, rather than respondent Pacheco's submission of a form containing minor errors. For her part, respondent Pacheco acted responsibly. She was unaware that she incorrectly filled in the Approval of Units form, because neither the District, nor her principal, brought it to her attention. Respondent Pacheco was also unaware

the District had not processed the form. Again, she had no notice that anything was amiss. The form was not rejected outright or returned with a request for further information, which she easily could have supplied to the District's satisfaction. Respondent Pacheco reasonably assumed the District was quite familiar with the courses for which she sought credit. The District had promoted the two courses by providing flyers to its teachers. Harmony's principal had approved respondent Pacheco's participation in both courses. Although the District cited the lack of information regarding the term in which the courses were offered as its main reason for not processing respondent Pacheco's form, that information was reflected in the transcripts she had already provided. Under the circumstances, the courses' terms should not have been difficult to discern.

32. The District asserted that if respondent Pacheco is not subjected to layoff, it will bear the cost of continuing to fund her employment during the 2017-2018 school year, incurring a monetary expense which would be "prejudicial" to the District. While this error may be costly, a financial hardship does not provide a basis upon which an improper judgment may be made.

33. The District has not established cause to subject respondent Pacheco to layoff under Education Code section 44955, subdivision (b), because 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. In this case, the seniority order with respect to respondent Pacheco was incorrectly established. Had further tiebreaking criteria been undertaken, respondent Pacheco may have been deemed to possess seniority over another employee with less seniority. At any rate, respondent Pacheco has been affected by the District's erroneous decision to subject her to layoff based on erroneous salary information. The appropriate remedy for this error is to direct that the notice to respondent Pacheco be rescinded.

LEGAL CONCLUSIONS

1. The fundamental principle of a PKS layoff is that permanent teachers must be laid off in inverse of their seniority. (Ed. Code, § 44955, subds. (b) & (c).) As set forth in Education Code section 44955, subdivision (b):

Except as otherwise provided by statute, the services of no permanent employee may be terminated . . . 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.

2. A District may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that

proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.) The burden is on the District to demonstrate that the reduction or elimination of the PKS is reasonable and that the District carefully considered its needs before laying off any certificated employee. (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 807-808.)

3. Legal cause exists to reduce or discontinue 17.0 FTE of PKS offered by the District as set forth in detail in the Factual Findings 1-8, 11, 12, and 14, as to all respondents excluding respondent Pacheco. The Board’s decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District’s school and pupils within the meaning of Education Code section 44949.

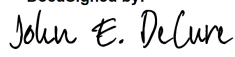
4. As set forth in Factual Findings 15-33, because the District did not establish compliance with section 44955, subdivision (b), when it improperly executed its tiebreaking criteria and relied on inaccurate information in deeming respondent Pacheco to have less seniority, subjecting her to layoff, the notice served on respondent Pacheco should be rescinded.

RECOMMENDATIONS

1. Cause exists for the reduction of 17.0 full-time equivalent certificated positions at the end of the 2016-2017 school year.

2. As set forth in Legal Conclusion 4, the District shall rescind the notice given to Karina Pacheco.

DATED: May 1, 2017

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JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A

LIST OF RESPONDENTS DELHI UNIFIED SCHOOL DISTRICT OAH Case No. 2017031127

RESPONDENTS:

Jennifer Duran

Lizenia Flores-Villanueva

Anet Fuentes

Kevin Garrison

Donna Lawry

Marisol Magana

Shannon McComb

Andrea Mendoza

Hefzi-ba Munoz

Karina Pacheco

Lydia Padilla

Paul Silva

Mary Slewo